

THE
CAMBRIDGE LAW JOURNAL

Vol. IV.—No. 1. - - - - - - - 1930.

PROCEEDINGS BY AND AGAINST THE CROWN.¹

SIR THOMAS INSKIP, C.B.E., K.C.

THE subject which I have chosen to speak upon to-night is, I am afraid, one of some technicality. But it is one of very great importance. Many of you are aware that it has been the object of much discussion in Parliament and the Press during the last few years. Officers of the Crown and heads of departments have been the target of criticism for their apparent and presumed reluctance to alter the forms of the proceedings by and against the Crown, and I am informed that a bill for altering the form of these proceedings is imminent.

The present government intends, I understand, to introduce a bill upon lines which have been very familiar to those interested in this subject for some time past, and my observations will be, to some extent, directed to the proposals which are likely to be placed before the public before very long.

The position of the Crown in this country is, of course, very well known to all those who are acquainted with our legal system. There is a well-known maxim, familiar to the veriest tyro in the law, that 'The Crown can do no wrong,' and it is supposed to be the basis of the rule which prevents the Crown from being sued in tort. I shall have some observations to make on that part of my subject later. There may be one or two gentlemen here familiar with the history of this maxim, but some little

¹ A paper read to the Cambridge University Law Society, October 31, 1929.
C.L.J.

misapprehension has existed in the public mind. I understand that the present Lord Chancellor has lately addressed you on this subject. I can only hope that my observations will not be at variance with anything upon which he may have directed you.

The subject of proceedings by and against the Crown was a matter to which Lord Birkenhead—when he was Lord Chancellor in 1921—addressed himself. He appointed a Committee, of which the Lord Chief Justice and the present Master of the Rolls—Attorney-General and Solicitor-General formerly—were members, in order to take into consideration the position of the Crown as a litigant. That Committee was appointed in November, 1921, but it was reconstituted from time to time, and perhaps it was rather like some other proceedings by the Crown in this respect, that, having been appointed in 1921, it did not report until 1927. During those years Lord Haldane, who was Lord Chancellor in the Labour government of 1924, amended the terms of the reference of the Committee which had been originally appointed to embody and give effect to such proposals as the Committee recommended should be made. Lord Haldane directed the Committee to prepare a bill upon the assumption that the alterations in law involved therein were both desirable and feasible, and the Committee—of which I had the honour to be a member—therefore merely directed themselves to the particular form of the proposals which might be made, without considering whether they were in all respects feasible or even advisable. It has been sometimes supposed that this Committee recommended all the proposals which I understand will shortly be put before Parliament. That is a complete misconception. The Committee never did consider the advisability of the proposals. They merely assumed that the alteration of proceedings by and against the Crown so as to assimilate them to proceedings between subjects was desirable, and then drafted a bill which has been attached to the Report of the Committee.

Now my observations may be divided into three parts. I shall try to be as untechnical as possible, partly for the very good reason that there are some parts of this subject which I very indifferently understand myself, and partly because within the space of time allotted to me it would be impossible for me to deal with many of the more technical matters which are, at the same time, of very great interest.

The three parts into which the subject may be divided are:—

First, that part of the matter which concerns the Crown as a

litigant either as plaintiff or defendant in proceedings other than tort.

Secondly, proceedings in tort; and

Thirdly, the position of the Crown in regard to costs.

These categories are not exclusive, but they will enable us shortly to consider the position of the Crown in those connexions which most interest the general public. The Crown, of course, in theory, is the litigant in all proceedings by and against the Crown, but in substance it is the department; it is either the Minister of Health, for instance, or the President of the Board of Trade, or the Minister of Transport, or some other head of a department. It is a complete fiction, at any rate nowadays, to suggest that the Crown is the actor in the proceedings. I am able to say this, further, that in my experience (and as your Chairman has been good enough to say, it is a considerable experience now,) in these proceedings, although the forms may be archaic, the Crown has been at no greater advantage than the subject litigant. I should not like to say this is true without any exception, but, generally speaking, the position of the Crown has been maintained with great fairness towards the subject.

Now this is not the opinion of the man in the street. It is generally supposed, and often said by critics of the existing system, that the Crown has an unfair advantage; that it is oppressive in the use of litigation; that it has power of resisting discovery or disclosure of documents, which gives it a most improper advantage over an opponent. I believe such accusations to be greatly exaggerated, and unfortunately this exaggeration by provoking replies to the critics has led to the postponement of reforms which everybody considers desirable.

When I come to speak of discovery of documents in litigation I think I can establish the truth of the statement which I have just made, but however that may be, nobody can now doubt that the time has come to alter the old system in some respects. Let me first of all deal with actions by the Crown. I do not want to plunge into the technicalities of the difference between what is called an English Information and a Latin Information, but let me say a word about Information as a class of proceeding. In the reign of Edward I the King was accustomed to sue in his Court by an original writ² in exactly the same way as a subject. It is a complete mistake to suppose that our existing system of proceedings by the Crown comes down to us from

² 1 Pollock & Maitland, 'History of English Law,' 517.

antiquity. In the time of Edward I the Crown would use exactly the same forms as the private litigant, and if anybody wants to study this matter he will find a mine of learning in an argument addressed to the Court in *Att.-Gen. of the Duchy of Lancaster v. Duke of Devonshire*,³ where Mr. Wills (afterwards Mr. Justice Wills) gave in argument an elaborate account of the forms which were open to the Crown in the King's Courts. As time went on, this practice was unfortunately altered and there arose a practice of making suggestions to the Crown for certain action which it was deemed advantageous to be taken in the interests of the Crown. These suggestions, which were generally acted upon, in time came to be regarded as the initiation of legal proceedings in their proper form and they came to be called 'Informations.' It is however a fact that they were originally made contrary to the wholesome practice which required the King to proceed by original writ just like ordinary mortals.

Informations, as some of you may know, are divided generally into two categories: (i) the Latin Information, as it is called, which may be described as a proceeding at law; and (ii) the English Information, which was a proceeding in equity. Nowadays, if the Crown is the actor as a plaintiff in litigation, generally speaking it proceeds by way of Information. The technicality in an action of that sort is of course considerable, but I take leave to say that in the great majority of cases the defendant does not suffer any disadvantage whatsoever. If you were strangers to the study of the law, and were to come to the conduct of an ordinary action, beginning with a writ and a statement of claim and all the proceedings in Masters' Chambers, you would think it technical. The proceedings by Information are really no more technical than those of an ordinary action. On the other hand, there is no doubt that the ordinary practitioner, particularly the country practitioner, is unfamiliar with this class of proceedings and is not therefore in a position to give his client proper advice.

It is not to be supposed however that all the advantage is on the side of the Crown. There is a procedure which is very familiar to practitioners known as Order 14 proceedings. When you come to practice in the Courts it will be one of the first proceedings with which you will obtain familiarity. Order 14 is an Order of the Supreme Court, which applies to a litigant

³ (1884) 14 Q. B. D. 195, 196—199. The origin of the *criminal* information has been disputed: 2 Pollock & Maitland, *op. cit.* 659; Holdsworth, 'History of English Law,' ix, 238.

who thinks he has an unanswerable claim for a fixed sum of money, or for a liquidated sum as it is called. The writ is specially endorsed with the exact nature of the claim; and if there is no defence the case is decided by a very summary method within a few weeks. The Crown has not that privilege. The result is that though there are innumerable small claims which the Crown has against private individuals, well suited for proceedings of a summary character, it must proceed by way of Information if at all. Now an Information, it is generally supposed, whether accurately or not, cannot be begun in the County Court, and the result is that many people who are debtors to the Crown escape their liabilities owing to the fact that there are no facilities for Order 14 or for County Court proceedings. I only say that, on account of the suggestion that all the disadvantages of the present system are on the side of the subject litigant. The Crown undoubtedly suffers some disadvantage, and if you and I were to look at the matter from the point of view of the government department, we should find there are many government departments which would welcome a modification of the existing system so as to assimilate proceedings by the Crown to proceedings by the subject.

Let me pass to actions against the Crown. An action against the Crown, omitting a claim in tort, that is to say a claim for a wrong done, must generally speaking be taken through a Petition of Right. I will not attempt to discuss the history of Petition of Right. There was and still is an old Petition of Right involved in mysteries which very few lawyers have attempted to understand. The Petition of Right Act to a certain extent simplified the procedure, but it is still a little difficult. A Petition of Right is a petition to the King in respect of some claim against the Crown upon which the King endorses the words 'Let right be done.' The practice is to submit Petitions of Right to the Home Office, or rather the Home Secretary, who obtains the advice of the Attorney-General as to whether the King should endorse the petition 'Let right be done.' When it is so endorsed the matter then proceeds and the Crown, or the Attorney-General, on behalf of the Crown, will be in a position to defend the action in the ordinary way with the ordinary consequences as to costs. The Attorney-General puts in an Answer which is in all essential points like the ordinary Defence. That again is a procedure which is unfamiliar to the ordinary practitioner. But let me once more say that in the generality of cases it does not embarrass the

litigant. It is merely necessary that he should frame his claim in such a way as to enable the Attorney-General to say that it is not an abuse of the process of the Court, that it is a genuine claim and that it is not a claim in tort which is at present not allowed against the Crown, and then the matter may proceed.

This being the position of the Crown as a defendant, undoubtedly there is a great deal to be said for the proposal that the Petition of Right procedure should be abolished. If you or I want to sue the Crown—which means a government department—there is no reason at all why we should not be allowed to pursue our remedies by the ordinary methods well known to legal practitioners. The adoption of this proposal will have this other advantage, that proceedings may then be taken in the County Court. As you know the County Court jurisdiction has grown in recent years. Formerly it was limited to £50; it has now been extended to £100. There is a proposal to extend still further certain jurisdictions. The County Court is undoubtedly a cheaper and, in many cases, a more convenient forum in which to litigate, and proposals will be laid before Parliament, I understand, which will enable the Crown to sue and be sued in the County Courts.

Now so far as I have gone I do not think anybody would object to the proposal to abolish Informations and Petitions of Right. I am not going to suggest to you, however, that the alterations in the law are all going to be in favour of the subject. I have known in my experience—both as appearing for a private litigant, and as appearing for the Crown—many cases in which the subject has been enabled to postpone the liquidation of his liabilities to the Crown merely because the Crown has to go through the very cumbrous processes which I have described. There is no doubt that the proposed changes will make it easier for the Crown to proceed against its debtors, and I am sure many people will not regard with favour the busybodies responsible for the alteration of the law.

I will now proceed to discuss the second part of this subject—that is, the right to sue the Crown in tort. As you are aware, the present system allows a person, by a roundabout method, to sue the Crown if it has done him a wrong. The practice is that such a person should sue the actual wrongdoer. The maxim says, ‘The Crown can do no wrong.’ Will you allow me to read a well-known passage from the judgment of Erle C.J. in *Tobin v. The Queen*,⁴ which explains this? ‘That which the Sovereign

⁴ (1864) 16 C. B. (N.S.) 310, 353–355.

does personally, the law presumes will not be wrong: that which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act the same as if there had been no command.'

Of course, the basis of the maxim is really the inconvenience which the body politic would suffer if it was supposed that the acts of the State or of the Crown could be a wrong, but then in these days there are so many cases in which the servants of the Crown do wrong that the public conscience has been disturbed. Take a very common case, the case of the reckless motor driver of the Royal Air Force. It may be said in practice that no injustice is done because the action is brought against the driver, and the Treasury pays the damages; yet somehow or other public opinion does resent the fact that it is impossible to sue the Crown for the wrongful acts of its servants, just as you and I can be sued for the wrongful acts of our servants if they act within the scope of their authority. On the other hand, although it is very easy to see at first sight that the Crown should be made directly liable, just as the private individual is, it is not very easy to carry it into effect. An officer, for instance, in the Navy is not in the same position as your chauffeur or your gardener, or your clerk, who are entrusted with certain definite duties. It is only when they carry out their assigned duties in such a way as to commit a wrong against a person that you are liable. A servant of the Crown, however, is not in the same relation to the King as your chauffeur is to you. Let me illustrate what I mean. Supposing you employ a gamekeeper; you authorize him presumably to arrest a poacher, but if instead of arresting a poacher he arrests a perfectly respectable citizen for walking through your grounds, it is outside the scope of his authority, and probably no action will lie against the master. His authority was to arrest poachers and to prevent persons from poaching, and not to interfere with and arrest respectable citizens when taking their evening walks. Contrast that with the position of a naval officer whose duty, for instance, is to prevent slave trading. It is his duty to do that and nobody can say that he has exceeded his duty as a naval officer if he arrests a ship which he believes to be a slave-trading ship that turns out not to be such, however much he was mistaken. Under the present law, an aggrieved person whose ship has been seized may sue the officer, but a great many unthinking people assert that the Crown ought to be sued and that proceedings should be taken against the Crown in tort. This really

goes much further than the law permits in cases between two ordinary persons. It is to make the Crown liable for wrongs which are done by its servants outside the scope of the authority committed to them, and this presents a question which is much more difficult and complex than some people think. It is not altogether easy to know how to deal with this question of suing the Crown in tort.

Now the case I have suggested is one which will be found in the books, and it contains the judgment of Erle C.J. It is the case already mentioned, *Tobin v. The Queen*. In that case a naval officer had seized a ship which he had thought to be a slave-trader, which was not so in fact. Erle C.J. said⁵: 'We think that the supposed analogy between the relation of the Queen to a captain in Her Majesty's navy, and the relation of a master to a servant, fails in the following respects: First, that the Queen does not appoint a captain to a ship by her own mere will, as a master chooses a servant, but through an officer of State responsible for appointing a man properly qualified; and, secondly, that the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty; and, thirdly, because the act complained of was not done by the order of the Queen, but by reason of a mistake in respect of the path of duty.' Now, notwithstanding this difficulty, it is proposed to make the Crown liable in tort, subject, it is true, to certain conditions. The difficulty comes when you have to consider the conditions or the circumstances in which the Crown may be sued in tort. I venture to suggest that the Chancellor of the Exchequer will find a great many claims made against the Crown, and probably successfully made against the Crown, which really ought not to be allowed. While we have such an army of public servants, income tax collectors, Customs officers, Home Office inspectors and so forth, probably every day of the week some of them do something which is in excess of their powers and outside the scope of their authority, and if the Crown is to be made liable for the damages which flow from the way in which all these persons behave, it may be that claims will be preferred against the Crown which ought to be made directly against the officers concerned.

I only mention that aspect in order to suggest to you that Parliament will be well advised if it deals cautiously with this suggested power to sue the Crown in tort. I should like to say further that the bill which is to be proposed excepts at

⁵ 16 C. B. (N.S.) at p. 352.

least two cases of tort which are the subject of very many of the complaints which we generally hear. Within my experience, either as Member of Parliament or as a law officer, I have repeatedly had to deal with complaints from persons whose property has been damaged either by Customs officers at ports of entry or in the post. But this bill which is proposed—as drafted by the Committee to which I have referred—recommends that injury of this sort should be excepted; that is to say, that persons who commit something to the post and find that it is delivered in an injured state will have no right against the Crown to recover damages. The public will be misled if they think that the present proposals will give everybody in all cases the right to recover damages against the Crown caused by the behaviour of public servants.

Now, I want to pass lastly, before I make one or two other observations, to the question of costs. The question of costs with regard to the Crown has always been one that interests the public. I remember appearing in a Customs case which concerned the entry of some films into this country. It was ultimately decided both in the Court of first instance, and in the Court of Appeal, that the Customs officers were wrong in seizing the films in question, but the Court found itself unable to grant costs to the successful litigant. It so happened that about sixty years ago a judge had made some observations upon the same disability and suggested that it was time that the Crown, in such cases, became liable for such costs. That was a hard case, or appeared to be. As you are aware the Crown neither pays nor receives costs under the old Common Law rule. I suppose it was beneath the dignity of the Crown to ask for costs against its subject, and it was supposed also to be inconsistent with its position to be required to pay costs. The Common Law however has been altered in many cases by Statutes which put the Crown in the same position as a private person with regard to costs, but whenever you see a case reported in the newspapers in which a private litigant has been successful and his application for costs has been refused, because it is not one where the Crown Suits Acts apply, or one of the other Acts which allows costs to be ordered, you will probably find some indignant person or Press-writer referring to the injustice of the existing law. There may be injustice in individual cases, but when you bear in mind that in the great majority of cases the Crown as a litigant is successful, it will easily be seen that, generally speaking, it is to the advantage of the public that the Crown should not be in a position to exact costs.

The Common Law rule applies to some proceedings which are very familiar to the public: (1) Prohibition. (2) Mandamus. (3) *Certiorari*. These are the three most familiar methods by which government departments or Courts of law are prevented from exceeding their powers or neglecting their duties. In all these cases the Crown neither asks for nor pays costs. I suggest that it is greatly to the advantage of the private litigant that this should be so. It is difficult and arduous and expensive enough to take action against the Crown, as it is, in such proceedings, but if the law is altered then applicants will be faced with the possible consequences of having to pay the costs of the proceedings. This is not a technical matter: it is a question of great public importance; persons prepared to institute such proceedings and litigate with the Crown will be fewer, I fear, than they are at the present time. I believe that it will be not at all to the advantage of the private litigant that the existing rule should be altered. The Common Law rule as to costs is on the whole to the advantage of the private litigant. It does not apply in revenue cases or in cases of Petitions of Right, but it does apply to the above-mentioned class of case, which is so very useful in enabling the subject to prevent government departments from exceeding their powers.

Now, I think I have detained you long enough in discussing this matter, but I want to say one more word. It does not come under my third heading, namely, costs; it relates to discovery. Discovery is, as you know, the word for the disclosure of documents. If you bring an action you are required to make a complete disclosure of everything that has been written to you, or by you, in your possession. It may contain an admission of facts which are fatal to your case, but you have to disclose it. The Crown, on the other hand, is not bound to disclose any document; that is to say, there is no power on the part of the Court to make the Crown disclose its documents, and a certain class of document the Crown never discloses. As you know, government departments conduct their business by Minutes written by clerks or heads of departments in which the various arguments for this or that course are developed, in order that the Secretary of State or Minister may give his final decision. These Minutes are never disclosed in litigation, whether by or against the Crown, even though they may assist the case for the Crown very materially.

The reason is, that government servants are reluctant to put their observations into writing if they are likely to be produced in a Court of law. With the present bill, it is proposed that

they shall in the ordinary course be produced, but it also proposes that a government official, or the head of a government department, shall have to make a statement of the documents which are in existence, and to claim privilege for those which he does not wish to produce. I venture to think that this is making a change which is really no change at all, unless the Crown is intended to be free to pick and choose the documents which it is safe to produce.

I can speak with some little experience as Solicitor-General for something like five and a half years, and as Attorney-General for fifteen months. I have known many cases where the Crown has been prejudiced by the rule that the Crown does not produce these Minutes and similar inter-departmental documents. I have never known a case in which the litigant has been prejudiced, but I remember an unreported case against a well-known company in France—the De Launay Belville Co.—involving a million of money or more. There was one document which we were precluded from producing by reason of this rule. A complaint was made against us for not producing all the documents, but if we could have produced that one document the case for the Crown was bound to succeed: the Crown in fact failed. I have known many other cases where I have been appearing on behalf of the Crown in which it has been most ardently desired to produce such documents. In future, if the law is changed, the only difference will be that instead of the Crown simply standing by and not producing the document, it will have to go through the formality of making out a certificate that certain documents ought not to be produced. This course has obvious dangers.

I have only mentioned this matter of discovery because you will no doubt hear this question much discussed. So far as I know, no bill which is likely to be introduced into Parliament will require the Crown to produce State papers which the head of a department cannot produce without injury to the Crown.

Now, I have very cursorily mentioned some of the main points in this much-discussed matter of Crown proceedings. I have of course left untouched many of those more technical matters—more technical even than those I have mentioned—relating to writs peculiar to the Crown. Generally speaking, the proposals in which the public are interested are those which I have mentioned to you. I want to add one more word of warning. There are great demands for these changes in the Press, but the Press do not entirely understand all the consequences that will follow if proceedings by and against the Crown

are made exactly like proceedings against subjects. Let me draw a lesson from another branch of the law: Two years ago there was an alteration in the law relating to super-tax. It had the effect of adding on one year in respect of which super-tax payers will have to pay super-tax. They will in future have to pay it after they are dead. This alteration was put into the Finance Act as the result of an agitation in the Press by persons who imperfectly understood the matter, and complained that they had to make two returns, one for income tax and one for super-tax. The officials of Somerset House found no difficulty in putting that right by a clause in the Finance Bill, but it had the unfortunate result, as Parliament and the country discovered later, that super-tax payers would have to go on paying super-tax one year after they were dead.

I only mention that as a warning. In this connexion the disadvantage of the litigant is very often noticed in the Press, and it would be a good thing if Parliament, and those who are concerned with it, would bear in mind that the disadvantages of the present system are not always on the side of the private litigant. Government departments and the Ministers of the Crown, whether they be Labour, Liberal or Conservative, are quite clever enough to see that any alteration made in the law will not put the Crown to any disadvantage. It behoves all of us to be cautious and watchful lest the alterations demanded in the Press and by the public effect too much; otherwise we may wake up to find that as the net result of the proposed changes the Crown as a litigant against a subject will be more powerful than ever.

LIABILITY FOR THINGS NATURALLY ON THE LAND.*

A. L. GOODHART.

IN his valuable article 'Dangerous Things and the Non-Natural User of Land,'¹ Mr. Stallybrass says²:

'The distinction between the natural and non-natural user of land is often confused with the distinction between things naturally on the land and those which are brought or artificially created there. We have already seen that to some extent this confusion can be detected in Lord Cairns' speech itself [in *Rylands v. Fletcher*]. But in fact there is nothing in common between the two conceptions except the common use of the word "natural."'

In the present paper an attempt will be made to consider what liability, if any, an occupier of land may have for things naturally on his land, a question which did not come within the scope of Mr. Stallybrass's article.

At the outset it is necessary to realize that the phrase 'things naturally on the land' covers two distinct classes of things which must not be confused if a correct analysis of an occupier's possible liability is to be made. The first class includes things naturally on land which has been artificially altered in some way by an act of man so as to cause, directly or indirectly, the harm complained of. The second class includes all things naturally on land which has not thus been altered by a human act. That this distinction is not usually made is shown by the following quotation from Salmond on Torts³:

'The rule in *Rylands v. Fletcher* applies to things which are artificially brought or kept upon the defendant's land, and is inapplicable to things which are naturally there, howsoever dangerous they may be—*e.g.*, noxious weeds, vermin, or water. So far from being absolutely liable for the escape of these things, the occupier of land is not even

* I am indebted to Professor Warren Seavey, of the Harvard Law School, for many of my references. He is not responsible, however, for any of the views expressed in this article.

¹ (1929) 3 Camb. L. J. 376.

² P. 395.

³ 7th ed., p. 351.

under any duty of care to prevent their escape. From such dangers every man must protect himself.' He then cites three English cases—*Giles v. Walker*,⁴ *Nield v. London and N. W. Ry. Co.*,⁵ and *Stearn v. Prentice Bros.*⁶—and one Irish case—*Brady v. Warren*⁷—in each of which the land had been artificially altered so that the result complained of was indirectly due to a human act. Salmond uses 'natural' in the sense of 'spontaneous,' the things having come on the land without external compulsion. In this sense a thing may be said to be spontaneously on land, even though the land has been prepared for its reception. Thus weeds which grow on ploughed land are naturally there as they have not been directly planted, and rats are naturally on land though they have been attracted by a heap of bones. Similarly all rain-water when it first falls on land is naturally there although it may later be artificially kept back by a barricade. It is obvious that things naturally on the land in this sense may differ legally from things which have not in any way been affected by a human act. Salmond cites no cases which fall within this second class.

In its Restatement of the Law of Torts,⁸ the American Law Institute also deals with the two classes as if they were one by using the phrase 'natural condition.' Section 233 reads:

'Neither a possessor of land, nor a lessor, vendor or other transferor thereof, is subject to liability for bodily harm caused to others outside the land by a natural condition thereon.'

The phrase 'natural condition' is defined as follows:

"'Natural condition of land' is used as a term to indicate that the condition of land has not been changed by any act of a human being, whether the possessor or any of his predecessors in possession or a third person dealing with the land either with or without the consent of the then possessor.' This covers class two, *i.e.*, land which has been unaltered. The definition continues:

'It is also used to include the natural growth of weeds and other vegetation upon land artificially made receptive thereto.'⁹

⁴ (1890) 24 Q. B. D. 656.

⁵ (1874) L. R. 10 Ex. 4.

⁶ [1919] 1 K. B. 394.

⁷ [1900] 2 Ir. R. 632.

⁸ Tentative Draft No. 4, 1929.

⁹ The following are not 'natural conditions': 'On the other hand, a structure erected upon land is a non-natural or artificial condition, as are trees or plants humanly planted or preserved and changes in the surface by excavation or filling, irrespective of whether they are injurious in themselves or become so only because of the subsequent operation of natural forces.'

This covers part of class one, *i.e.*, land which has been altered. Nothing is said about vermin or water, as in the quotation from Salmond, but it is hardly probable that the statement as to weeds and vegetation was meant to be exclusive. It is based on 'the few American decisions upon the subject,' and is carefully limited to them.

Having got our two distinct classes of 'things naturally on land,' it is necessary to consider the cases which deal with them separately, although it will be submitted at the end of this paper that an occupier of land is equally liable for both classes if they constitute a nuisance. As most of the decided cases are concerned with things spontaneously on land which has been altered by the occupier or his predecessor in title, it will be convenient to discuss them first, even though they are, of course, less clear cut than those cases which concern land unaltered by a human act.

Of things which may come spontaneously on land there are four main kinds,—weeds, trees, animals and water,—and we will discuss the cases in that order.

Things on Altered Land.

(a) *Weeds.*

It is hardly likely that counsel or the judges in *Giles v. Walker*¹⁰ realized that they were concerned with a case which was to become one of the leading cases of the law, or they might not have treated it quite so cavalierly. Counsel for the plaintiff failed to cite the one case,—*Proprietors of Margate Pier and Harbour v. Town of Margate*,¹¹—which most strongly supported his contention, and of the two judges in the Divisional Court only one delivered a judgment—of two sentences—while the other merely concurred. It may perhaps be suggested that this brevity indicates that the case is nothing more than an illustration of a long-established and unquestioned rule, but if this is so why is the case invariably cited as a leading one by textbook writers as if it had, for the first time, definitely established what was before, at best, a doubtful principle of law?

As the grounds on which the case was decided are not entirely clear it is necessary to consider the facts with care. The defendant occupied land which had originally been forest land but which had been brought into cultivation by his

¹⁰ (1890) 24 Q. B. D. 656.

¹¹ (1869) 20 L. T. (N.S.) 564. This case is discussed *infra*, p. 27.

predecessor. The forest land prior to cultivation did not bear thistles but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles, and as a consequence thistle seeds were blown in large quantities on to the plaintiff's adjoining land where they did damage. In the Divisional Court Lord Coleridge C.J. disposed of the case in two sentences. 'I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil.'

It is important to note that the thistles were not the natural growth of the soil *in its natural condition*. It was not until the land had been cultivated that the thistles appeared. It is true that the defendant did not bring the thistles directly on his land, but neither does a man who digs a reservoir for rain-water bring the water there directly. This has been emphasized by Clerk and Lindsell ¹²:

'This decision must be regarded as turning upon the fact that the operation which caused the thistles to spring up was a natural use of the soil. If it had been a non-natural use, then, although he did not intentionally bring the thistles on to his land, but they grew there spontaneously as the result of his having broken up the surface, he would have been liable on the principle of *Hurdman v. N. E. Ry. Co.*' ¹³

The case may be explained on either of two grounds. The first one is that, as the defendant had not himself created the nuisance, he could not be held liable for it. In the fuller report of this case in the *Law Times*,¹⁴ Lord Esher M.R. is reported as saying to counsel for the plaintiff: 'This damage is not caused by any act of the defendant. Can you show us any case which goes so far as to say that, if something comes on a man's land for which he is in no way responsible, that he is bound to remove it, or else prevent its causing injury to any of his neighbours?' Counsel failed to reply, although *Proprietors of Margate Pier and Harbour v. Town of Margate*¹⁵ would have been a complete answer. If this is the ground on which the case was decided then it is in conflict with the later case of *Attorney-General v. Tod Heatley*,¹⁶ in which the Court

¹² 'Torts' (8th ed.), p. 389.

¹³ Cf. Fraser on the Law of Torts (11th ed.), p. 88: 'It must be borne in mind that an ordinary and natural use of land will not give a cause of action even if damage is caused to neighbours; e.g. there is no duty in law to cut thistles, though the thistledown will be carried on to other persons' soil. (*Giles v. Walker*).'

¹⁴ (1890) 62 L. T. 933, 934.

¹⁵ (1869) 20 L. T. (N.S.) 564.

¹⁶ [1897] 1 Ch. 560.

of Appeal held that an occupier of land was under a duty to abate a public nuisance created by third parties for whose acts he was in no way responsible.

The second, and perhaps the more probable, ground is that the judges did not consider thistles and thistledown sufficiently dangerous to constitute a nuisance. A thing may be an annoyance, and even an evil, without being so serious as to give rise to legal liability. As Sir Frederick Pollock has said¹⁷:

‘There is no duty to keep in things which, though noxious in some sense, are not dangerous, and have not been brought on the defendant’s land by his own act. A man is not bound to cut the thistles on his land or keep in the thistle-down (*Giles v. Walker*).’

In this life we must all put up with some inconvenience. It may be annoying for a landowner if, in the autumn, leaves from his neighbour’s trees blow on to his lawn, yet that can hardly be called a nuisance. In the American case of *Salmon v. Delaware Lackawanna & Western Ry.*¹⁸ it was held that there was no obligation on an adjoining landowner to keep his leaves from being blown on to the railroad’s tracks. The Court said: ‘In the absence of special legislation, a man does not become a wrongdoer by leaving his property in a state of nature.’ The expression ‘state of nature’ here, as the expression ‘natural growth’ in *Giles v. Walker*, probably means nothing more than ‘ordinary state,’ for it can hardly be suggested that blowing leaves would constitute a nuisance even if the trees had been artificially planted. On the other hand, if the leaves were poisonous an entirely different question would arise, not depending necessarily upon the point whether the trees were self-grown or not. To maintain poisonous trees on one’s land against which a neighbour could not adequately protect himself would, it is submitted, be a legal, as well as a moral, wrong.¹⁹ Because

¹⁷ ‘Law of Torts’ (13th ed.), p. 508, n. (s).

¹⁸ (1875) 38 New Jersey L. 5.

¹⁹ A contrary view is expressed in Halsbury’s ‘Laws of England,’ vol. 3, p. 127, § 251, in the chapter on ‘Boundaries, Fences and Party Walls,’ where it is said that no action will probably lie ‘if poisonous leaves from trees growing naturally on the land are blown on to the adjoining land, and cause injury to the cattle eating them.’ The authority for this statement is Kennedy J.’s dictum in *Smith v. Giddy* (1904) 73 L. J. Q. B. 894, at p. 896, where the case is more fully reported than in [1904] 2 K. B. 448:

‘It is the law, I think, that, as long as the yew tree is proved not so to overhang, and the yew tree leaves have not been so cut by the owner as to fall on the neighbour’s land, there is no right of action, although the neighbour’s cattle may be hurt by eating leaves from the yew trees. I suppose that no action would under such circumstances lie because in a high gale (to take the simplest case), yew leaves are blown on to the adjoining land, and cause injury to animals which eat them. No action, I take it, would

the Court in *Giles v. Walker* decided that the comparatively harmless thistledown did not constitute a nuisance, the case is hardly authority for Salmond's sweeping statement that an occupier of land is never liable for 'things which are naturally there, howsoever dangerous they may be.'

(b) *Trees.*

It is hardly surprising that there is no English case in which the question of liability of an occupier for a tree growing naturally on his land has been directly considered, for most boundary trees in England have been planted. Nevertheless some of the dicta in the tree cases are of interest.

In *Crowhurst v. Amersham Burial Board*²⁰ the defendants planted two yew trees about four feet within their boundary, but the trees grew through and beyond the boundary railings. Although the growth of the trees was in their 'natural course,' as counsel for the defendants pointed out, the trees were not naturally on the land, so the question discussed in this paper did not arise.

In *Smith v. Giddy*²¹ the defendant was held liable because his elm and ash trees were allowed to overhang the plaintiff's premises and thereby damage them.

Nothing was said in the case as to whether or not the trees had been planted by the occupier or his predecessor in title. Apparently Beven thought that the trees were spontaneous, for he said²²:

'The distinction between the cases (*Crowhurst v. Amersham Burial Board* and *Giles v. Walker*) is most obvious: in the one something deliberately introduced produces injury through projecting over a neighbour's land; in the other the injury arises from the spontaneous product of the soil.

'Had the Judges in *Smith v. Giddy* considered the case of *Giles v. Walker* they probably would not have affirmed the proposition that an action lies against an adjoining landowner for allowing his trees to overhang the boundary of his estate to the damage of his neighbour's crops.'

Beven's view of the case finds support in Kennedy J.'s state-

lie for that. If there are thistles growing naturally on a person's land, the mere fact that the thistledown is blown on to his neighbour's land and produces a crop of thistles there gives the neighbour no right of action.'

With all respect, the comparison between poisonous leaves, which may render an adjoining farm valueless, and thistledown is hardly convincing.

²⁰ (1878) 4 Ex. D. 5.

²¹ [1904] 2 K. B. 449.

²² 'Negligence' (4th ed.), p. 513.

ment of the law, for it is not limited to trees artificially planted²³: 'It seems to me to be good law that a man has no right to maintain upon his own land, and, instead of confining it within that land, thrust it, or allow it to thrust itself, from that land on to his neighbour's land, something which thereby does damage to his neighbour.' A tree growing naturally on land is, of course, as much maintained there as one which has been artificially planted. Against Beven's view it is necessary to point out that as these trees were fence trees they probably were planted. Moreover, the Court in *Smith v. Giddy* was following *Crowhurst v. Amersham Burial Board* in which the trees were planted. It cannot be said, therefore, that the case is a clear authority for the view that an occupier can be held liable for the damage done by a self-grown tree which has become a nuisance.

In the recent case, *Noble v. Harrison*,²⁴ there are *dicta* which suggest that any distinction between self-grown and planted trees is immaterial. Thus Rowlatt J. said²⁵: 'To grow a tree is one of the natural uses of the soil, and it makes no difference, in my judgment, whether the tree was planted or self-grown, etc.' And Wright J. remarked²⁶: 'I do not think it material to consider whether the beech was originally planted (as most boundary trees would be) or whether it grew casually.' As the Court found that the overhanging tree did not constitute a nuisance *per se* and that the defendant had no reason to know of its dangerous condition, it was not, however, necessary for it to decide the question whether there would have been liability on the part of the occupier if the tree had been self-grown. This case illustrates the fact that liability for a natural nuisance would not place an unduly onerous burden on an occupier of land, for he would only, at most, be under a duty to abate it after he knew, or ought to have known, of its existence.

It is important to note that in neither *Smith v. Giddy* nor in *Noble v. Harrison* did the plaintiff apparently introduce evidence to prove that the defendant or his predecessor in title planted the tree. If this were material, would it not be necessary to allege and prove the fact?

(c) *Animals.*

Is the occupier ever liable for animals naturally on his land, *i.e.*, for animals which he has not himself brought there? This,

²³ In the fuller report of this case in (1904) 73 L. J. Q. B. 894, 896.

²⁴ [1926] 2 K. B. 332.

²⁶ P. 342.

²⁵ P. 336.

of course, eliminates all question as to the liability he may have for domestic animals, these having been intentionally introduced. The question is complicated by the peculiar doctrine of property in animals which has made the law on this subject so difficult and illogical. In *Boulston's Case*²⁷ the defendant made coney-boroughs on his own land, the coney increasing in so great number that they destroyed his neighbour's land. It was held that 'his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for as soon as the coney comes on his neighbour's land he may kill them, for they are *ferae naturae*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coney does in which he has no property, and which the other may lawfully kill.' In this case, the coney having been 'deliberately introduced, they cannot be said to have been naturally on the land. The ground for the decision was that the defendant had no property in them, and, therefore, was not liable for the damage they did after they escaped.

In *Farrer v. Nelson*,²⁸ Pollock B. refused to follow the doctrine of *Boulston's Case* when he said, 'The moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent, he is doing that which is unlawful, and an action may be maintained by his neighbour for the damage which he has sustained.'

In the Irish case of *Brady v. Warren*²⁹ the three judges ostensibly claim to be following *Boulston's Case*, but they do so in a peculiarly half-hearted manner. Palles C.B. says that it applies when the occupier does nothing to increase the animals, but is doubtful whether it applies if he brings animals on the land.³⁰ This, of course, makes nonsense of the *ratio decidendi* of *Boulston's Case*. Boyd and Johnson JJ. seem to consider that the rabbits did not constitute a nuisance, for, as Johnson J. said, the defendant did not go³¹ 'beyond what was reasonably necessary in order to enable him to have the natural and reasonable use and enjoyment of his own land, which is his lawful

²⁷ 5 Co. Rep. 104 b. Also reported as *Bowlston v. Hardy*, Cro. Eliz. 547.

²⁸ (1885) 15 Q. B. D. 258.

²⁹ [1900] 2 Ir. R. 632.

³⁰ At p. 660: 'I purposely refrain from considering whether an action would lie against a person who by his own act, such as *bringing* rabbits on his land, caused them to increase to such an unreasonable extent that his neighbour's lands are thereby injured to a greater extent than they would have been, had the natural growth of the wild rabbits already on the lands not been effected (*sic*).'

³¹ At p. 643.

right.' The case is therefore no authority for the view that an occupier of land cannot be held liable for noxious animals naturally on his land 'howsoever dangerous they may be.' As the judges were careful to stress the fact that the rabbits did not constitute a nuisance the case might almost be cited for the opposite view.

In *Bland v. Yates*,³² Warrington J. granted an injunction against the defendant who used an excessive quantity of manure in which flies bred. These flies bred as spontaneously as did the thistles in *Giles v. Walker*,—nevertheless the defendant was held liable. Cannot the distinction between the two cases be found in the fact that the flies, under the circumstances, were a nuisance, while the thistledown was not?

In *Stearn v. Prentice Bros., Ltd.*,³³ we find an interesting throw-back. Defendants, who were bone manure manufacturers, kept a heap of bones which caused rats to assemble there. The rats then made their way to plaintiff's land and ate his corn. In his judgment in the Divisional Court, holding the defendants not liable, Bray J. purported to follow *Boulston's Case*, saying, 'I am not aware that this decision has ever been overruled or questioned.' As the defendants had no property in the rats they were not liable for their depredations.³⁴ Concerning this astonishing conclusion Salmond remarks,³⁵ 'Probably this case [*Boulston's Case*] is no longer law, though approved and followed in *Stearn v. Prentice Bros.*' It is strange, therefore, that Salmond himself should, half a page above, have cited both *Stearn v. Prentice Bros.*, and *Brady v. Warren* as two of his four authorities for his statement that an occupier of land is never under a duty of care to prevent the escape of things naturally on his land.

The various animal cases discussed above admittedly are confused and conflicting, but it is submitted that the conclusion reached by Warrington J. in *Bland v. Yates* is both good sense and good law. An occupier of land is entitled to keep a reasonable number of animals on his land, whether they are there naturally or have been specially introduced, but if they increase

³² (1914) 58 Sol. J. 612.

³³ [1919] 1 K. B. 394.

³⁴ It is doubtful whether on the facts of this case there was anything which might be called a nuisance, for the learned judge says, at p. 395: 'It was quite consistent with the plaintiff's evidence that the increase in the number of rats was due to its being a good breeding year, or to the fact that the neighbours had not killed down the rats sufficiently in the previous winter for want of labour or some other cause. It was not shown that rats bred on the defendants' premises, nor did it appear where they bred, nor that the defendants had neglected any duty, if duty there was on them to destroy the rats.'

³⁵ 'Torts' (7th ed.), p. 351, n. (m).

to an unreasonable extent, then he is under a duty to abate this nuisance.

(d) *Water.*

In *Nield v. London and North Western Ry. Co.*³⁶ (cited by Salmond³⁷ for the principle that an occupier is not liable under any circumstances for water naturally on his land) the defendants, to protect their premises, built a barricade of planks against flood water which, being penned back, flooded the plaintiff's premises. The defendants were held not liable, Bramwell B. saying³⁸:

'The law allows what I may term a kind of reasonable selfishness in such matters; it says, "Let everyone look out for himself and protect his own interest," and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, "Why did not you do the same?"'³⁹

In *Wilson v. Waddell*⁴⁰ mineral workings by the defendant caused a subsidence and a consequent flow of rainfall into the plaintiff's adjacent lower coal-field. It was held that the injuries, which were due entirely to gravitation and percolation, were not a valid ground for any claim for damages. Lord Blackburn said⁴¹:

'The general rule of law in both countries [Scotland and England] is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals; and that a servitude to prevent such an user must be founded on something more than mere neighbourhood.'

In *Middlesex Company v. McCue*⁴² it was held that the owner of land upon the slope of a hill running down to a mill-pond might cultivate and fertilize it in the ordinary way without becoming liable to an adjacent owner for material carried into his pond. Holmes J. said⁴³:

'Some damage a man must put up with, however plainly his

³⁶ (1874) L. R. 10 Ex. 4.

³⁷ 'Torts' (7th ed.), p. 351, quoted *supra*, at p. 14.

³⁸ At p. 7.

³⁹ Cf. *Gerrard v. Crowe* [1921] 1 A. C. 395, in which this case is approved, and the law as to the reasonable defence of one's property is explained at length.

⁴⁰ (1876) 2 A. C. 95. Cf. *Smith v. Kenrick* (1849) 7 C. B. 515, and *Baird v. Williamson* (1863) 15 C. B. (N.S.) 376.

⁴¹ At p. 99.

⁴² 149 Mass. 103 (U.S.A.).

⁴³ At pp. 104, 105.

neighbor foresees it before bringing it to pass. . . . We are of opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may.'

In these three cases, therefore, the occupier of land was held not liable for water naturally on the land.

In *Bagnall v. London and North Western Ry. Co.*⁴⁴ the defendants cut and removed twenty feet of the surface soil over the plaintiffs' mines to get the level at which they laid their rails. By removing the soil, porous rock was reached, and water percolated through it and penetrated into the mine. The defendants were held liable.

In *Hurdman v. North Eastern Ry. Co.*⁴⁵ the statement of claim alleged that the defendants had placed soil against the plaintiff's house, and rain percolated through it into his house. The statement of claim was held to disclose a good cause of action, for, as Cotton L.J. said ⁴⁶:

'If anyone by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured.'

In *Whalley v. Lancashire and Yorkshire Ry. Co.*⁴⁷ the defendants, in order to protect their embankment, cut trenches in it by which flood water flowed through and went ultimately on to the land of the plaintiff. It was held, that though the defendants had not brought the water on their land, they had no right to protect their property by pouring it on the plaintiff's land. Brett M.R. said ⁴⁸:

'But now comes this question, the danger has not been brought by a person on his own land, but it has come there—an extraordinary danger, which, if left standing there, will injure his property, but not that of his neighbour. Can he then, in order to get rid of and cure the misfortune which has so happened to himself, do something which will transfer that misfortune to his neighbour? That seems to me to be contrary to the well-known maxim that you must not, when

⁴⁴ 7 H. & N. 423.

⁴⁵ (1878) 3 C. P. D. 168.

⁴⁶ At p. 173. Cf. *Broder v. Saillard* (1875-6) 2 Ch. D. 692.

⁴⁷ (1884) 13 Q. B. D. 131.

⁴⁸ At p. 137.

you have the choice, elect to use your property so as to cause injury to your neighbour.'

Later he continues ⁴⁹:

'I think if a man be so situated with regard to his neighbour that by an ordinary act in the use of his neighbour's land, such as by deep ploughing, the ordinary flow of water is sent from that land on to his land he would be in the position of having his land subject to the defect and therefore could not recover for the injury he might so suffer.'⁵⁰

In these last three cases the occupier was held liable. But in all the six cases the water came spontaneously on the land and was not directly brought on to it by the defendant. In all the cases the defendant had done something which had either increased the flow of water into the plaintiff's land or had altered the nature of the flow. Nevertheless in the first three cases the defendant was held not liable, while in the next three cases he was held liable. We cannot therefore say either that a man is liable for the results caused by water naturally on his land or is not liable for such results. These cases are all determined on the ground that the *user* of the land was either normal or abnormal, or that the defence against a natural condition was reasonable or not, and this, as Mr. Stallybrass has said,⁵¹ is based on the principle of mutual sufferance. The water cases are, therefore, cases of natural user and not of natural condition. The fact that the water came on the land naturally and spontaneously is immaterial.

It is submitted that the above cases, which deal with the four types of things which may be spontaneously on land, do not support Salmond's sweeping statement that an occupier of land is never liable for 'things which are naturally there,

⁴⁹ At p. 141.

⁵⁰ Cf. Clerk & Lindsell on Torts (8th ed.), p. 389, n. (s): 'But these agricultural operations would not, upon the principle of the mining cases above referred to, include the making of ridges and furrows where the object was to get rid of the water.'

⁵¹ 'Dangerous Things and Non-Natural User of Land' (1929) 3 Camb. L. J. at p. 396: 'If we avoid these pitfalls it appears a perfectly valid distinction to take between the normal and abnormal user of land,' and to base it on the principle of mutual sufferance, as expounded by Bramwell B. in *Bamford v. Turnley*.'

The citation from *Bamford v. Turnley* (1860) 3 B. & S. 62, at pp. 83, 84, reads as follows:

'Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. . . . It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.'

howsoever dangerous they may be.' Liability for weeds, trees, animals and water does not seem to depend on the question whether these things are spontaneously on the land or not. An owner of land is allowed to plough his land even though water may drain through the furrows, but he may not dig a deep cut which will place an unreasonable burden on his neighbour. He may cultivate his land even though thistledown is blown on his neighbour's land as a result. He may allow a reasonable amount of game to exist on his land, for this is only the ordinary enjoyment of his own property, but if the game increases so as to be a nuisance to his neighbours then he is liable. In all these cases the test is not whether the thing is there naturally and spontaneously or not, but whether the occupier has acted reasonably in relation to it and to his neighbour.

There is no theoretical difficulty in holding him liable in these cases for, although the noxious thing is in a certain sense spontaneous, still it would either not have been on the land at all, or not in the same way, if it had not been for his act or that of his predecessor in title.

Things on Unaltered Land.

When we turn to the question of an occupier's possible liability for a natural condition on land which has not been interfered with, we must first determine on what principle liability for a condition on land is predicated. Is an occupier's liability based on the fact that he or his predecessor in title has done something which has created the nuisance? If this is the sole ground, then clearly an occupier cannot be held liable for a natural condition on unaltered land, for here he has done nothing. The principle 'No liability without fault' would apparently prevent any obligation from being attached to him. That an occupier's liability is not, however, based on this comparatively narrow ground appears in the following clear summary of the law by Rowlatt J. in *Noble v. Harrison*⁵²:

'A person is liable for a nuisance constituted by the state of his property: (1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.'

In other words, an occupier is liable not only because he may have created a nuisance, but also because he has allowed one to

continue on his land after he has had a reasonable opportunity of abating it. The occupation of land may involve disadvantages as well as advantages. Thus in *Att.-Gen. v. Tod Heatley*⁵³ Lindley L.J. points out that 'it is the common law duty of the owner to prevent this piece of land from being a nuisance.' In that case the owner of the land was held liable for a nuisance created by third parties who threw refuse on his land.⁵⁴ Apparently the law in America is the same, for the Restatement in section 234 (c) provides that a possessor of land is subject to liability even if

'the condition is created by a third person without the possessor's consent or acquiescence, but reasonable care is not taken to make the condition safe after the possessor knows or should know of it.'

No unfair burden is placed on the occupier by this rule, for he is not liable until he 'knows or should know' of the harmful condition, and he need only take reasonable care to make it safe. In brief, an occupier must use reasonable care to see that his land does not cause harm to others outside the land.

Is there an exception to this rule when the harm is caused by a natural condition? An artificial pond on my land becomes stagnant and infects the neighbourhood. I am liable. A natural pond becomes stagnant. May I sit by and do nothing? Refuse is thrown on my land by strangers. It is my duty to use reasonable care to abate the nuisance. Refuse is blown on my land by the wind. May I permit it to remain? A trespasser injures one of my planted trees so that it is about to fall into the highway. It is my duty to cut down the tree. A storm half uproots one of my self-grown trees. May I allow it to crash into the highway? Such an astonishing exception to the general rule that an occupier must take reasonable care of his property ought to be established by clear authority before it is

⁵³ [1897] 1 Ch. 560, 568.

⁵⁴ It is not necessary to consider here the important distinction between liability for a public and a private nuisance as laid down in the majority judgments in *Job Edwards, Ltd. v. Birmingham Navigations* [1924] 1 K. B. 341, a decision which has been described as 'not altogether satisfactory' (Salmond, 'Torts' (7th ed.), p. 223, n. (h)). Even though the occupier may not have to abate the private nuisance at his own expense, the question still remains whether a natural condition can be a private nuisance so as to give the injured party his remedy by abatement. As the thistles in *Giles v. Walker* were not a nuisance, Giles could have no right to enter and cut them. If they had been a nuisance, public or private, Giles would have had the right to abate them. In any case, *Job Edwards, Ltd. v. Birmingham Navigations* does not purport to affect the 'very onerous duty upon the possessor of land or premises upon which a public nuisance exists' (Bankes L.J. at p. 350). Such a public nuisance must be abated by the occupier at his own expense even if created by a third party, or, as we submit, by natural causes.

recognized. When we turn to the cases we find, however, that there seem to be only two English cases on the point, and one of them is directly against the view that there is such an exception. As has already been pointed out, the doubtful case of *Giles v. Walker* is not in point here, for in that case the land was not in its natural condition but had been brought under cultivation.

The leading English case is *Proprietors of Margate Pier and Harbour v. Town Council of Margate*,⁵⁵ decided by the Divisional Court on a case stated by the justices. In this case the proprietors of the harbour were required to abate a nuisance caused by seaweed which had been brought in by the tide. Lush J. said ⁵⁶:

‘I have no doubt, whatever, that it is the duty of the appellants to prevent the accumulation of seaweed so that it shall not become a nuisance, and that, whether produced by natural or artificial causes, they are bound to remove all matter in the harbour which is a nuisance, or injurious to health.’

During the argument the following colloquy took place between judge and counsel ⁵⁷:

Hayes J.—‘Suppose a dead horse were thrown by the sea on the land, would it not be the duty of the occupier to get rid of it?’

J. Browne Q.C.—‘We might suppose a large whale to be thrown upon a small plot of ground of a poor man; it is doubtful if it would be his duty to remove it.’

This appeal to *misericordia* did not affect the judgment of the Court. It is obviously a hardship on an innocent occupier to be forced to remove a nuisance created there by a trespasser, but it is one of the possible liabilities which an occupier must weigh against the advantages he receives when he takes the land. Why is it more of a hardship to be forced to remove a nuisance created by nature?

In *Att.-Gen. v. Tod Heatley* ⁵⁸ A. L. Smith L.J. cited the *Margate Case* at length and with strong approval.

Apparently the *Margate Case* was not called to Eve J.’s notice in *Pontardawe Rural District Council v. Moore-Gwyn*,⁵⁹ in which he held that an occupier of land need take no steps to

⁵⁵ (1869) 20 L. T. (N.S.) 564.

⁵⁶ At p. 568.

⁵⁷ At p. 567.

⁵⁸ [1897] 1 Ch. at p. 571.

⁵⁹ (1928-29) 45 T. L. R. 276.

prevent rocks, which had been loosened by the natural agency of weathering, from falling. He said that,⁶⁰

'The action was, therefore, an attempt to impose on an owner, who was using and enjoying his land in the ordinary manner of its use and reasonably, liability for damage sustained by the property of another through natural agencies.' He was apparently moved by the consideration that it would be a hardship on the defendant to remove these rocks, a consideration which did not affect the judges in the *Margate Case* in spite of the dramatic illustration of the whale. The only case in point to which he referred—*Giles v. Walker*—can be explained on the ground that the falling thistledown was the sort of annoyance which a reasonable neighbour must expect to suffer. A reasonable neighbour can hardly be expected to suffer falling rock. The other cases cited, such as *Rylands v. Fletcher*,⁶¹ *Blake v. Woolf*,⁶² and *Rickards v. Lothian*,⁶³ deal with the entirely different point of natural user, as Mr. Stallybrass has shown in his article.⁶⁴ With all respect to the learned judge, we feel that the *Margate Case* bears greater weight.

Two other cases can be conveniently considered here, one from Australia and one from the United States. In *Sparke v. Osborne*⁶⁵ the defendant's land became overrun with prickly pear, which was a danger to the neighbours. He took no steps to cut it down, and it was held that he was under no duty to keep it from spreading to adjacent land. Griffith C.J. said that an occupier is liable if 'the active use of his land injures his neighbour's land,' but that he is 'not liable for mere non-feasance.'⁶⁶ This is not correct, for non-feasance is a ground for liability if a nuisance has been created on an occupier's land by a third person. He cites two English authorities. In the first, *West Cumberland Iron and Steel Co. v. Kenyon*,⁶⁷ Brett L.J. said: 'If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner, he cannot succeed.' It is difficult to see how this

⁶⁰ At p. 277.

⁶¹ (1868) L. R. 3 H. L. 330.

⁶² [1898] 2 Q. B. 426.

⁶³ [1913] A. C. 263.

⁶⁴ At pp. 395, 396: 'And he [Eve J.] apparently relied upon *Giles v. Walker* and *Blake v. Woolf* as if the point decided in the two cases was the same.'

⁶⁵ (1909) 7 C. L. R. 51.

⁶⁶ At p. 59. Isaacs J. says at p. 72: 'Absolute and complete inaction in relation to land is not use of the land, and the maxim *sic utere tuo*, etc., does not apply. It was on this principle that in *Giles v. Walker* the defendant was held not liable for the spreading of thistles to the plaintiff's land.'

⁶⁷ (1879) 11 Ch. D. 782.

is in point when the question is not as to a natural user but as to a natural nuisance. The second case cited is *Giles v. Walker*,⁶⁸ in which the thistledown was not, it is submitted, a nuisance. No mention is made of *Proprietors of Margate Pier and Harbour v. Town of Margate*,⁶⁹ which is directly in point. Apart from authority, the case is decided on the ground that to hold the defendant liable would be 'casting an intolerable burden'⁷⁰ on him, but on the next page the learned judge says: 'In nearly all the Australian States provision has been made by the Legislature for dealing with cases of this kind, requiring a person . . . to take precautions to prevent the pest from spreading to his neighbours.' Apparently the burden is not so intolerable when imposed by legislation.

The last case which we need consider is the American case of *Roberts v. Harrison*.⁷¹ A jury returned a verdict finding a natural pond on the defendant's land to be a nuisance, and the justices of the peace directed the sheriff to abate the nuisance. The defendant carried the case by *certiorari* to the superior Court. The *certiorari* was sustained on the ground that while, in a sense, the pond complained of was a nuisance, it was not such a legal nuisance as the justices of the peace had jurisdiction to abate. In his opinion Simmons C.J. says⁷²:

'The presence of the pond and the attendant evils were doubtless annoying and even injurious to persons residing in the neighborhood, but . . . this Court has held that a person is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failure of duty.'

He then cites the following statement of the law in Wood on Nuisances, sect. 116:

'Where water collects in low, marshy places, and, by reason of becoming stagnant, emits gases that are destructive to the health, and lives even, of the community, this is not a nuisance in the legal sense; and the owner of the land is not bound to drain it, nor can he be subjected to action or indictment therefor. The reason is, that in order to create a legal nuisance, the act of man must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes cannot become a nuisance, even

⁶⁸ (1890) 24 Q. B. D. 656.

⁶⁹ (1869) 20 L. T. (N.S.) 564.

⁷⁰ At p. 59.

⁷¹ (1897) 101 Ga. 773.

⁷² At p. 775.

though the person upon whose premises the cause exists could remove it with little trouble and expense.'

Such an anti-social doctrine would seem to require the strongest authority in its support, but the few cases cited are hardly impressive. As might be expected, *Giles v. Walker*⁷³ is given as the sole English reference, and words spoken about the comparatively harmless thistledown are made to cover gases destructive of the health and lives of the community. It is worthy of note that this Georgia case reaches the remarkable conclusion that the pond 'is not such a legal nuisance as the justices of the peace have jurisdiction to abate.' Apparently the occupier of the land is free to continue a nuisance which is injurious to the health of his neighbours, and they are unable to protect themselves in any way.

Strange as it may seem, these four cases are apparently the only ones in which liability for what may be called a purely natural nuisance has been clearly raised. Three of them are against the view that an occupier may be liable if he does not make reasonable efforts to abate the nuisance. In spite of this numerical preponderance of authority, we believe that the *Margate Case* is the one which lays down the correct principle. There seems to be no adequate reason for making a special exception in the case of natural nuisances; an occupier of land owes a duty to the public to see that his land is not kept in such a condition as to injure persons outside of his land however that condition may have arisen.

It is, therefore, submitted that the English cases do not support Salmond's generally accepted statement that an occupier of land, altered or unaltered, cannot be held liable for 'things which are naturally there, howsoever dangerous they may be.' The correct principle seems to be that an occupier of land is liable for a nuisance of which he knows, or ought to know, whether that nuisance is caused by himself, his predecessor in title, a third person or by nature. Whether a natural condition is or is not a nuisance is, of course, a question of fact. Is the injury caused by the natural condition more than a reasonable neighbour can be asked to bear under the rule of 'live and let live'? In other words, the ordinary rules of nuisance apply in the case of natural conditions. As we must all bear with our neighbour's piano-playing so we must also submit to his thistledown. This does not mean that we have no remedy if he introduces a large orchestra, or if he allows his tree, even

⁷³ By error the case is cited as '*Gates v. Aratkir*,' 24 Q. B. D. 656.

of natural growth, to remain in a dangerous condition along the highway. The mistaken doctrine as to non-liability for a natural condition seems to have arisen through a confusion with the correct doctrine as to natural user. Unfortunately for this branch of the law a touch of nature has made cases kin which are entirely distinct both in principle and fact; because an occupier is not liable for consequences which follow upon natural user, it is erroneously said that he is, therefore, not liable for a natural condition, howsoever dangerous it may be.

NOTE ON AMERICAN CASES.

The American law on this subject is stated as follows in the chapter on Nuisances in 46 *Corpus Juris* 655:

‘ § 19 B. Injuries from Natural Causes.

‘ One cannot be said to create or maintain a nuisance where the condition or state of affairs complained of is due solely to natural causes and he has not by his own act contributed to bring about the alleged nuisance. A different rule is applied when the injury results from a culpable act concurring with the action of the natural elements.’

This statement is supported by the citation of eleven American, and one English, cases. An examination of these cases throws, however, some doubt upon the validity of the statement. It is convenient to consider them in the order given in *Corpus Juris*.

1. *Brimberry v. S. F. & W. Ry. Co.*, 78 Ga. 641. This was not a case in which natural causes were concerned. The defendant railroad built a road which forced water through ditches built by others into the plaintiff's pond. It was held that a person was not guilty of a public nuisance unless the injurious consequences were the natural and proximate result of his own act. If such consequences were caused by the acts of others so operating on his acts as to produce the injurious consequences, then he would not be liable. According to the principle of this case, an occupier of land cannot be held liable for a nuisance created by third persons.

2. *Roberts v. Harrison*, 101 Ga. 773. This case has been discussed *supra*. It is a genuine case of natural causes, its principle being that an occupier can only be held liable for ‘his own acts or failure of duty.’ This statement begs the question whether an occupier is under a duty to abate a natural nuisance.

3. *Brown v. Campbell*, 21 Haw. 314. A statute requiring land to be filled in was held constitutional. On p. 321 the Court, in a pure *dictum* said: 'Land in an insanitary condition or otherwise deleterious to the public health through natural causes not contributed to by man was not a nuisance at common law.' Wood's Law of Nuisances was cited. The question was not before the Court.

4. *Peck v. Herrington*, 109 Ill. 611. The defendant drained a small pond into a regular channel. Here the defendant acted. The Court said: 'It may be regarded as a well settled principle of law, that where two farms adjoin, and one lies lower than the other, the lower farm will be subject to the natural flow of water from the one which lies in a more elevated position.' This is true even if land is being cultivated, for 'a man has a right to cultivate his land in the usual and reasonable way' (*Middlesex Co. v. McCue*, 149 Mass. 103).

5. *Cumberland Pipe Line Co. v. Com.*, 214 Ky. 698. In this case oil escaped from a pipe line. It does not seem to have anything to do with the present question.

6. *Livezey v. Schmidt*, 96 Ky. 441. It was held, as in *Peck v. Herrington*, *supra*, that 'where one has suffered injury solely by reason of the natural flow of water from his neighbor's premises, he has no right of action.'

7. *Hartwell v. Armstrong*, 19 Barb. 166 (New York). The Court held that it was a lawful exercise of the right of eminent domain to enter and appropriate the lands of individuals for the purpose of draining a swamp, but that it was necessary to provide just compensation to the owners. There was no finding that this swamp was a public nuisance.

8. *Woodruff v. Fisher*, 17 Barb. 244 (New York). The Court dissolved an injunction against the commissioners appointed to drain a swamp so that what was said was purely *dicta*, but in so far as a principle of law was laid down, it would be contrary to the view that a natural condition can never be a nuisance, for on p. 231 Hand J. said:

'It does not appear by the act or the complaint, that the sickness to be prevented prevails among inhabitants on the wet lands, nor whether these lands will be benefited or injured by draining . . .'

9. *State v. Rankin*, 35 S. C. 438. The defendant was indicted for causing water to stagnate by a dam and become a public nuisance. The Court said:

'While it is true that the defendant would be liable if his obstruction of the creek, by his pond and dam, was in itself

the cause of the injuries complained of, yet, if the consequences are to be attributed to the acts of others, so affecting his property that it becomes a public nuisance, it would not appear consistent with justice or propriety that he should be held to responsibility.'

Here no distinction is made between natural causes and the acts of third parties.

10. *Bowman v. Virginia State Entomologist*, 128 Va. 351. A statute providing for the destruction of red cedar trees which harboured 'cedar rust' was held constitutional. As in *Brown v. Campbell, supra*, the remark that 'it is true that the cedar trees which fall within the condemnation of the statute would not have constituted either a public or a private nuisance at common law' was only a *dictum*, and, as in the former case, the Court cited *Wood on Nuisances*.

11. *Mohr v. Gault*, 10 Wis. 513. The outlet to defendant's lake became obstructed by natural causes. It was held that he was not at liberty to drain off the waters by some other channel, but that his efforts must be directed to the removal of the obstruction which caused the back water. If this case is in point at all, it seems to be against the view that the occupier of land is not concerned with natural causes.

12. *Giles v. Walker* (1890) 24 Q. B. D. 656. This, the only English case cited, has been discussed *supra*.

Thus, of the twelve cases cited, only *Roberts v. Harrison* is directly in point, and that case lays down a principle which is not limited to natural causes. It cannot be said, therefore, that these authorities are convincing.

THE OFFICIAL MANUALS OF ROMAN LAW OF THE EIGHTH AND NINTH CENTURIES. .

EDWIN H. FRESHFIELD.

THE two manuals here referred to are known respectively as the *Ecloga* and the *Procheiros Nomos*. They are distinguished from all others subsequently edited by private jurists or the Colleges of Notaries by the fact that they were issued through the Imperial Chancery in the name and by the authority of the Sovrans. They begin like an English Act of Parliament, by a short title and a preamble in which the Emperors address their subjects in the first person plural, indicating the occasion and announcing the purpose of their new exposition of law. They use the kind of official Romaic Greek affected by the *anti-grapheis* or official draftsmen of the period. The language is simple and direct and the student will have no difficulty in interpreting it when he has mastered the vocabulary.

The word 'manual' is used here for the sake of convenience to describe these two books, and it is an accurate description of the *Procheiros Nomos*, which does not profess to be more than a handy epitome of the voluminous code composed by the author. But the *Ecloga* is really a code in the form of a synopsis of the Roman law of Justinian. We do not know how that law was understood and put into practice during the later half of the seventh century and the interregnum of ten years which preceded the accession of Leo III in 717 A.D., for after the accession of the Emperor Constans II in 642 A.D. and during the ensuing eighty years the history of the Empire is veiled in the most profound obscurity. The law of Justinian was probably only understood, and that but imperfectly, through the Greek paraphrases of Theophilus. We see from the preamble of the *Ecloga* that 'the laws enacted by previous Emperors have been written in many books . . . the sense thereof is to some difficult to understand, to others absolutely unintelligible, and especially to those who do not reside in this our imperial God-protected city.' I am inclined to suspect that in practice the Roman law was then treated as 'customary,' as traditional *leges et consuetudines*, which had existed from time immemorial.

On the other hand, we may be certain that at the close of the seventh century the administration of justice was lax and entirely unsatisfactory.

The purpose of Leo III in compiling the *Ecloga* was three-fold. First to revise the laws of Justinian in the direction of humanity. Next to present them in a language which would be intelligible to his subjects, and lastly to provide the magistrates with a 'eusynoptic' view of the pious laws and 'to facilitate their decisions, to ensure a just prosecution of the guilty, and to restrain and correct those who had a natural propensity to evil doing.'

The first and second of these purposes (a more humane version of Roman law, and the use of Greek) distinguish the *Ecloga* from every book or exposition of law (other than a few Novels in Greek) which preceded it, and in those two respects the *Ecloga* set an example and a precedent for every exposition of later Roman law which succeeded it. In regard to the first, the *Ecloga* marks an entirely new departure in Roman jurisprudence. It has been called, and quite accurately, the first Christian law book, the first in which an attempt was professedly made to combine the principles of Christian equity with those of Roman law. We do not know to what extent Leo III succeeded in reforming abuses and improving the administration of justice. We see in the preamble that upon that subject the Emperors addressed the magistrates with some very plain language and, dealing with it in a practical way, directed that thenceforward the judges should receive their stipends from the Imperial Treasury and so avoid any pretext for bribery and corruption.

We should know something about the circumstances in general, and in particular about the genesis of the *Ecloga*, were it not that Leo III and his son Constantine V involved themselves in the famous controversy regarding symbolism. Of that controversy there is, fortunately for us, no trace in the *Ecloga*. But the hatred against these Emperors and their supporters in the religious reforms was so great in subsequent ages that all their works have perished, except the *Ecloga*, which was preserved by accident, probably because it was wrongly attributed to Leo VI and Constantine VII of Macedonia and not Leo III and Constantine V of Isauria. The fact is that the historians of the subsequent ages, who are the only authorities we possess, either from conviction, or because they found it politic, were avowedly hostile to the Isaurian Sovrans. They pass over, almost in silence, Leo's Oecumenical victory over Moslemah and

the important military, legal, financial, and administrative reforms due to him, and, dwelling on ecclesiastical matters at inordinate length, give them a prominence which their importance in the general history of the Isaurian period does not justify.

Like his Heraclian predecessors, Leo III took a keen interest in matters of religion. He was the protégé and aide-de-camp of his predecessor Justinian II. We may notice in passing that upon the gold *nomismata* of that Sovran we meet, for the first time in Roman history, the effigy of Our Lord in place of the Sovran's portrait, and the conventional legend '*Victoria augustorum*' is replaced by the prayer '*Deus adiuta Romanis*' and '*Iesus Christus Rex regnantium*.'

The distinctly religious and wholly Christian character of the *Ecloga* and the attempt to make the Roman law more humane by the light of Christian doctrine will cause no surprise. It may be true to call the seventh century the 'dark ages' of Later Roman, indeed of European history, but from the scanty evidence which has come down to us we know that the *Romaioi* of the period preceding the accession of Leo III were not wanting in intellectual attainments and that religious sentiments in particular continued to acquire an increasing hold upon the Sovrans and their subjects.

It will simplify the narrative if I give here a translation of the title and the preamble of the *Ecloga*, a list of the contents of the text, and of the Appendices annexed to it.

'**THE ECLOGA.** A selection of laws arranged in a brief and compendious form by Leo and Constantine the wise and pious Emperors, taken from the Institutes the Digests the Code and the Novels of the Great Justinian and improved in the direction of humanity; edited in the month of March, 9th Indiction in the year of the world 6234.¹

In the name of the Father and of the Son and of the Holy Ghost, Leo and Constantine the Faithful Emperors of the Romans.

Our God the master and maker of all things who created man and granted him the privilege of free will and gave a law in the words of prophecy to help him and thereby made known all things which he should and should not do so that he might choose the former as sponsors of salvation and eschew the latter as the cause of punishment; and not one of those who keep His commandments or who, save the mark, disregard them, fails to

¹ A.D. 726.

receive the appropriate reward of his deeds. For it was God who declared both these things aforetime and the power of His unalterable words, judging every man according to his deeds, will not, as the Gospel tells us, pass away.

Since therefore having delivered to us the Sovranty of the Empire, as it was His good pleasure, He added this thereto, to make manifest our love with fear toward Him, in that He bade us, as He bade Peter the supreme Head of the Apostles, to feed His most faithful flock: We can conceive nothing more acceptable by way of thanksgiving to Him than the righteous and just government of those entrusted to us by Him, so that henceforward the bonds of wickedness may be broken, the unjust breaches of covenants may be stopped, and the attempts of transgressors may be crushed, and thus by victories over our enemies, through His almighty hand, we may be crowned with the encircling diadem and the throne may be confirmed, more precious and honourable, and in peace to ourselves, and the republic established on a firm foundation.

Whence, busied with such cares and watching with sleepless mind the discovery of those things which please God, and are conducive to the public interests, preferring Justice to all things terrestrial as the promise of things celestial, and as being, by the power of Him who is worshipped in her, sharper than any sword against foes; knowing moreover that the laws enacted by previous Emperors have been written in many books and being aware that the sense thereof is to some difficult to understand, to others absolutely unintelligible, and especially to those who do not reside in this our imperial God-protected city, we have called the most illustrious Patrician, our Quaestor, and our most illustrious patricians, and our most illustrious consulars and comptrollers, and others who have the fear of God, and we have ordered that all these books should be collected in our Palace; and having examined all with careful attention, going through both the contents of those books, and our own enactments, we considered it right that the decisions in many cases and the laws of contract and several penalties of crimes should be repeated more lucidly and minutely to ensure a eusynoptic knowledge of the force of such pious laws, and to facilitate the decision of such causes clearly, and to ensure a just prosecution of the guilty and to restrain and correct those who have a natural propensity to evil doing.

And we do exhort all those who have been appointed to administer the law and command them to abstain from all human passions and by a sound understanding to pronounce the

sentences of true justice neither despising the poor nor permitting a transgressor to go unpunished. Nor to make a pretence of doing justice and equity by word, but in reality choosing injustice and cupidity as profitable. But when two persons have a suit before them, one who has greedily obtained riches at the expense of another who has been reduced to penury, to make equity between them, taking from the former the amount which the latter has been unjustly deprived of. For there are some who do not treasure truth and justice in their hearts, but, corrupted by riches, willing to favour for friendship's sake, revengeful through personal enmity, importunate in office, are incapable of doing justice and illustrate in their lives the words of the psalmist. 'Do ye indeed speak righteousness, do ye indeed judge rightly, ye sons of men? And if indeed here ye work wickedness in your hearts, ye weigh the violence of your hands in the earth.'²

Just as the wise Solomon, speaking by way of parable concerning the dispute about the unfair measures and weights, says a weight great or small is an abomination to the Lord.³

These matters are publicly decreed by us for the admonition of those who on the one hand know what is right but pervert the truth, and on the other for those who are wanting in good sense and those for whom it is difficult, or altogether impossible, to hit the mark and give an equitable judgment between man and man. Folk such as are referred to by Jesus the son of Sirach, 'Seek not of the Lord pre-eminence neither of the King the seat of honour, and seek not to be a judge being unable to remove iniquity.'⁴

Let those and those only who participate in sense and reason and know clearly what true justice is, exercise straight vision in their judgments, and without passion apportion to each his deserts. For so also our Lord Jesus Christ, the power and wisdom of God, giveth unto them far more abundantly the knowledge of justice and revealeth those things that are hard to discover; who also made Solomon truly wise when he sought out justice and granted him the privilege of successfully hitting the mark, in the dispute over the child.

For what the women said was unsupported by testimony. And he commanded that the matter should be decided by nature and thus determine the doubtful case. And while the strange woman received the command to lay hands on the child without

² Psalm lviii, 1—2.

³ Proverbs xi, 1 and xx, 10.

⁴ Ecclesiasticus vii.

emotion, the mother, through the natural affection which she bore, could not endure to hear the sentence.

Let those who are appointed by our Pious Majesty to try cases and decide disputes and who are entrusted to find the true measure of our august Laws reflect upon these matters and take them to heart.

And thus we shall strive to uphold the sceptre of the Empire placed in our hands by God. With such weapons and by God's almighty power, we desire firmly to resist our foes, and endeavour to increase and advance the highest happiness of those, sealed with the emblem of Christ, committed to our benevolence. And by such means we hope that the ancient jurisdiction of the Empire will be established in us for ever. Our Lord Jesus Christ tells us: 'Judge not according to the appearance, but judge righteous judgment,'⁵ judgment free from all favour of reward. For it is written, 'woe to those judging unrighteously for the sake of reward who turn aside the way of the meek⁶ and take away the just due of the righteous from him; their root shall be as rottenness and their blossom shall go up as dust because they have cast away the law of the Lord.'⁷

For gifts and offerings blind the eyes of the wise. Therefore being solicitous to put an end to such wicked gain we have determined to provide from our patrimony salaries for the most illustrious Quaestor, for the comptrollers, and for the officials employed in administering justice, to the intent that they may receive nothing whatever from any person, whomsoever he be, who may be tried by them, in order that what is said by the prophet may not be fulfilled in us, 'he sold justice for money,'⁸ and that we may not incur the wrath of God as transgressors of His commandments.'

The Contents of the *Ecloga* are:—

Chapter 1. Betrothal. 2. Marriage. 3. Dower. 4. Simple Gifts. 5. Wills. 6. Intestacy. 7. Guardians. 8. Freemen and Slaves. 9. Sale and Purchase. 10. Loan and Pledge. 11. Deposit. 12. Emphyteusis. 13. Leases. 14. Testimony. 15. Dissolution of Contracts. 16. Property of Soldiers. 17. Offences and Punishments. 18. Division of the Spoils of War.

The Appendix is divided into nine chapters as follows:—

Chap. 1. From Justinian's Code; concerning sureties and obligations; five sections.

⁵ Gospel according to St. John vii, 24.

⁷ Isaiah v, 23 and 24.

⁸ Amos ii, 6.

⁶ Amos ii, 7.

Chap. 2. From the same and the Digests; boundaries of land, trespass and offences against real property; six sections.

Chap. 3. Punishments applicable to soldiers; aptly called by Professor Ashburner, the 'Mutiny Act.' The author seems to have had the *Strategica* of the Emperor Maurice to his hand. Sixty-eight sections.

Chap. 4. Penalties for heretics, sorcery, and poisoning. The author has consulted the Acts of the Councils at Nicea and Constantinople (the Quinisext or Trullan, held by the Emperor Justinian II in his palace) also the Digests, on apostacy; twenty-six sections.

Chap. 5. Illegal marriages contracted between senators and low-class women, or by Imperial rescript, or between free women and their slaves; from the Code. Five sections.

Chap. 6. Ordinances from the Code, the Digests, Athanasius Scholasticus, and John Couvidos, concerning murder, sorcery, astrology, and heathen sacrifices. Thirty sections.

Chap. 7. On the degrees of kinship; from the Institutes. Nine sections.

Chap. 8. On Jurisprudence; from the Digests; six sections.

Chap. 9. Synopsis of the 'law given by God through Moses to the Israelites'; forty-seven sections.

Another version of the *Ecloga* was found in the Paris MS., Gr. 1384. For the sake of convenience it has been called the *Ecloga Privata Aucta*. Nothing is known of the origin or history of this manual, or whether it was formally published. But there is some indication that, if not actually published, it was prepared 'by authority,' because it contains an allocution by the Sovrans to their subjects respecting the devolution of marital property and, incidentally, on disinheritance. This allocution does not figure in the *Ecloga*, but something like a paraphrase of it will be found in the *Procheiros Nomos*. In other respects this manual follows the *Ecloga*; the law, with one important change and some minor alterations, is the same, and it is expressed in much the same language; but the drafting is better and more explicit.

The title is as follows:—

'In the name of the Father and of the Son and of the Holy Ghost. Leo and Constantine the faithful in Christ and ever august Emperors of the Romans; from the Institutes.'

The allocution referred to occurs in Chapter II, section 10, which I have paraphrased in the following words: 'These provisions shall be strictly observed not only by those who contract marriages after the date of the present decree, but

we command that those who have already contracted marriages by a written agreement shall be bound by and obey the present august law. Trusting, as we do by the help of Almighty God, that any pretext for wrong-doing may be averted, we have determined to apply the present compendious law to marriage contracts, so that the family relations in regard to patrimonial property may be amicably established; that parents may be moved by affection towards their children, that children may be reconciled to their parents, and that strife and reproach, litigation and contention may be banished; lest in place of the respect and honour meet and due by children to their parents, quarrels and affliction arise and thereby prove them to be transgressors of God's commandments.'

It will be noticed that the date and preamble are missing, and, though following the arrangement of subjects adopted in the *Ecloga*, the manual professes to be based on the Institutes only.

The important variations from the *Ecloga* are: (a) in the chapter on Deposits or Bailment; (b) in the provisions for legal rates of interest on money lent; (c) in the arrangement of the chapter on crimes.

(a) Bailment is treated more exhaustively in this manual than in any of the others; the chapter will repay perusal. (b) Nothing is said in the *Ecloga* about interest on money lent; the word *tokos* does not occur. Perhaps the omission was intentional, for a charge of interest on money lent by clerics was forbidden by the Acts of the Quinisext Council. By the *Procheiros Nomos* this prohibition was made general upon the ground stated in the first person by Basil I himself, who declares that to charge interest was contrary to the public policy of a Christian State. In the *Ecloga Privata Aucta* the principle of charging interest is not only recognized, but rates of interest are prescribed, and they varied according to the status of the lender. Moreover, the maritime rate of 12 per cent. is expressly mentioned and tallies with that given in the Rhodian Law. I have drawn attention to this interesting subject in the introduction to my translation of this manual.

(c) For some reason the order of the subjects in the chapter on Crimes has been changed, and, on the whole, for the better. The law which imposed capital punishment on any *Romaïos* who taught the art of shipbuilding to the foes is not in the *Ecloga*.

I hazard a conjecture that this manual is a revision of the *Ecloga* and might be attributed either to Constantine V or

perhaps Nicephoros or even later, but in any case before the accession of Basil. I do so for the following reason.

By the *Ecloga* we see that Leo III imposed upon the bishops and clergy, the Church, the monasteries and asylums the duty of taking charge of the person and property of infant orphans for whom their parents had not provided guardians. The *Ecloga*, it should be said, makes no distinction between a guardian of the person and a trustee of property. The distinction was revived in the *Procheiros Nomos*. When Constantine V, his son, dissolved the religious houses the duty seems to have been undertaken by the State, and of this change we find the first indication in this manual in the appointment of a *scriba* or notary to attest the register of the orphan's property, and in the law forbidding bishops or clergy to act as guardians, except for their near relatives. We find this change perfected and prescribed by the *Procheiros Nomos*, where it is laid down that the *quaestor* or *eparch* in Constantinople was the guardian of city children, and the *archon* was responsible for the provincial children. I suspect that these changes were the result of the dissolution of the religious houses by the Emperors Constantine V and Leo V. Some provision had to be made for the care of orphans and their property. In regard to them the problem was similar to that which arose after the dissolution of the monasteries by our Tudor Kings. The Poor Law Act of Queen Elizabeth (5 Eliz. c. 23) and the Acts of King Henry VIII and Edward VI which preceded it were passed to provide for the indigent and infirm who had been supported by the benevolence of the monks. Our Tudor Kings recognized, as Constantine V did, that the triumph of the Reformation would be impossible so long as the monks retained their status and their privileges. After the dissolution the duty of maintaining the poor devolved upon the State in England; and the State at Constantinople was obliged in similar circumstances to undertake similar obligations to nourish and protect the orphans and their property. The new duties were entrusted to the high officials in the capital and the provinces.

The *Ecloga* continued to be the official exposition of the laws, so far at least as Constantinople and the Eastern dominions were concerned, until the publication of the *Procheiros Nomos* of Basil I, the Armenian, and founder of the so-called Dynasty of Macedonia. But in spite of the disparaging remarks about the *Ecloga* made by Basil in the preamble of the new official manual, and the attempt unsuccessfully made by him or his son Leo VI to suppress the *Ecloga* by a second edition of the

new manual, called the *Epanagoge*, which, however, was never published, the *Ecloga* was used as a precedent both in form and in substance.

The *Procheiros Nomos* begins with a title and a preamble in the names of Basil, the Sovran, and the Caesars, his sons Constantine and Leo (afterwards Leo VI). The date when this second official manual was published is not given in the title, nor is it known exactly, but it can be fixed between the accession of Basil in 867 and the death of his eldest son Constantine in 879.

The preamble runs:—

‘**I**T has ever been a matter of anxious concern to us who call upon the name of our Divine Lord Jesus Christ, to seek out and to promote those things which are profitable and advantageous to our subjects committed to us by God; but especially justice which foremost and best of all conduces to the fear and honour of the Divine Majesty. [Then follow quotations from the Old Testament. Proverbs xiv, 34; Isaiah i, 16—18 and x, 1—3.] Desiring then, as we do, to impart those Divine precepts to everyone in a compendious form, seeing how profitable they are to mankind, and looking to God as the author and finisher of our labours, we have decided to undertake the compilation of a book of law. Many of our predecessors have undertaken the task of making laws and we do not wish to condemn them without reason, but because of the infinite variety of cases and also of the alteration in circumstances and the change in men, manners, and customs, the Corpus of law has expanded into a well-nigh endless and confused mass. Whence much weariness ensues to students. Wherefore some of those who studied the laws tried to elucidate them, others to amend them, and some even omitted provisions which were consequently condemned to eternal oblivion. And since the knowledge of these laws is necessary for all men, how could we avoid this tediousness and make the study of law more easy to grasp? In no other way than by scrutinizing this mass of written law, and extracting those provisions which are necessary, and useful, and in constant demand, and then edit the same chapterwise in this present manual, omitting none which ought to be generally known to the people at large. We have therefore reduced the Corpus of law into a compendious form, translating the same from the Romaic language into the Helladic tongue; purging those laws which had become corrupt, and when needful, altering them in the direction of greater utility. And where

no provision existed we devised new laws to suit the need. So that besides elucidating and abbreviating these laws we have not omitted to supply new laws where the old laws seemed to be defective. And having selected these laws we have epitomized them into forty chapters. And for anything we have omitted here (since it was not possible to include the text of the endless volumes in this synopsis) those who so desire must draw their information from the code of law which we have completely revised.

As a compilation of this synoptical kind was made by Emperors who preceded us someone may perhaps ask why we were not satisfied to reproduce it in a second edition. It must be understood that that book which they called a manual was not an *Ecloga* (a selection) but rather the author's perversion of good laws, harmful to the State and fit only to perpetuate foolishness. For what justly-minded person would think it right to devise a work intended to pervert laws made by many Sovrans and pious teachers, laws which conduced, for the more part, to the good order of the State. Anyone who does not accept this present law should rather be convicted of outrage to those former and pious legislators than accepted for instruction. We do not, however, totally reject that ancient manual but only those parts of it which justly merit repudiation. It must be understood that this present manual, now newly compiled by us, is intended to confirm the well-ordained laws and facilitate the comprehension of them. And regarding what we have said above concerning the restoration of old laws it is to be known that all those which are abrogated by us have been collected in one volume so that their futility may be apparent to all men. Those laws which we have on the other hand preserved are set out in their own order in sixty books. And thus we leave to those who wish to acquire a knowledge of the laws the means of obtaining it.'

This is followed by the quaint observation that as we owe our existence to the betrothal and marriage of our parents he proposes to begin with marital relations.

Basil's purpose was threefold. First to revise and resuscitate Justinian's laws, expurgating what was corrupt, and supplementing the deficiencies by new provisions adapted to altered circumstances. The foundations of this revision were, no doubt, the many books which Leo III tells us he collected together and brought to the palace where they were studied by his ministers, Nicetas and the two Marinus. Basil's new publication

was to be contained in sixty books, and the old laws which were obsolete were collected together in a separate volume. Next, the present manual was intended to be an introduction and a synopsis of the larger work. It was intended for students and for the profession. Thirdly, the Isaurian manual was to be discarded as a book, but only those parts of it which merited repudiation were to be entirely rejected. How much was retained, both in form and substance, can be seen even in the draft of the second edition of the *Procheiros Nomos*, to which the suitable title Epanagoge was given. The preamble of the Epanagoge declares the total rejection of, indeed a prohibition against the use of, the *Ecloga*, and the Isaurian legislation in general is referred to with contempt. But the Epanagoge does not seem to have got beyond the draft stage, and the total rejection of the *Ecloga* referred to in the preamble was never effected. It was probably found impossible.

Though several manuals were composed privately during the reign of Leo VI and his successors, it does not seem that the *Procheiros Nomos* was superseded by any other official publication of the kind. And in the fourteenth century Harmenopoulos seems to treat it as still in use at his time, for, as he explains in the Introduction to the Hexabiblos, he uses it as the basis of his new manual. I may add in passing that the Hexabiblos, the last manual published in Greek while the Empire was in existence, was the authority for the Roman law upon which the Patriarchate relied for administering justice to the Greek-speaking subjects of the Porte under the Capitulations of Mahomet II. The Hexabiblos thus became the basis of the Codes of the Balkan States as each community freed itself from the Ottoman yoke. After the liberation of Greece the Dictator, John Capodistria, and King Otho, who followed him, adopted it as the official text-book of Hellenic law until a new code could be prepared.

It must not be supposed that the restrictions or the prohibition on the *Ecloga* could have been enforced by Basil or his successors in the Western dominions of the Empire, in Sicily, and Southern Italy, where, to use a colloquial phrase, the 'Macedonian' Emperor's writ either did not run or could only be served at the point of the bayonet.

I do not believe that the *Procheiros Nomos* was known or used in Sicily till after the Norman Conquest; for when Syracuse was captured by the Arabs within a short time of Basil's accession, Sicily was lost to the *basileis* for good and all; nor did it revert to Christendom till the Arabs were vanquished

by Guiscard and Roger, the Norman Counts of Apulia and Sicily.

In Calabria and Apulia the fate of the subjects of the *basileis* was quite different and, until the Norman Conquest, which was completed by the surrender of Squillace in 1060, they remained subjects of the Soverans at Constantinople. As a general rule the Governments of the Eastern Roman Empire were able to do little to protect them from the raids of the Saracens. In the Amorian period an Arab Emir was established at Bari and, as we see from the history of the Pontificate of John VIII (872—882) Rome itself was besieged and the whole of Southern Italy came within measurable distance of becoming Saracen territory like Sicily.

The appeal of John VIII to the Emperor Basil I was not made in vain. A Byzantine fleet was sent to the Straits of Messina and the Admiral won a signal victory over the Arabs. That victory inspired new efforts to rid Italy of the Arabs and, for a short time, the Franks, the Lombards, and the *basileis* joined forces and were successful in expelling them from the Italian Peninsula. At that time and again in the reign of Basil II (976—1025) the Eastern Roman Government attempted to restore the authority of the *basileis* in Apulia and Calabria. It is either in the reign of that Emperor, or perhaps a little earlier, that an important book of law was compiled in Calabria. It is called the *Procheiron Legum*, and is known to us by the MS. Gr. 845 in the Vatican Library, admirably edited by the late Professor F. Brandileone of Rome. It was copied at Soverato, a village near Catanzaro, in Calabria. It has no title or preamble and is not dated.

The contents of this important manual, which was compiled for use in Calabria, show that the *Ecloga* held its place and continued to be used concurrently with the *Procheiros Nomos* in the Italian Imperial dominions. The first chapters and one on crimes are taken from the *Ecloga*, while all but the last two are taken from the *Procheiros Nomos*. The author was obviously acquainted with the pretentious manual called the *Epitome*, edited privately in the reign of Constantine Porphyrogennetos. The last two chapters are derived from that source.

Besides the *Procheiron Legum* there is another manual of the same kind, composed at a later date, which was probably intended for use in Sicily in the reign of the Norman King, William II. It is called the *Ecloga ad Procheiron Mutata* and is known to us from the celebrated MS. at the Bibliothèque Nationale, Paris 1384. It was copied in 1160 or, as I believe,

compiled at that date under the auspices of the Greek notaries. By co-operating with the native Sicilians these notaries had then recently scored a triumph over the Norman-French Chancellor, Stephen du Perché, the kinsman of the Queen Mother. They obtained his dismissal and secured a renewal of their privileges from King William II of Sicily and his Privy Council, including Roger Palmer and Archbishop Walter of Palermo, the President of the Council.

This manual is interesting for other reasons. It is founded upon the *Ecloga*, but in place of the appendices of that earlier manual it contains a version of the Farmers' Law and of the Rhodian Law. In the next place it contains several chapters on Greek ecclesiastical law regarding the selection, election and consecration of a bishop, and the ordination of a priest, the method of founding and ruling a monastery and of admitting a probationer, and general rules of private personal law applicable to those who took orders or became monks.

The introduction of these chapters of Greek Canon Law, besides other passages copied from the *Ecloga* and derived from the Acts of the Trullan Council and later Synods of the Church of Constantinople, deserve more than a passing notice.

Speaking generally, the *Ecloga* followed the fortunes of the Oecumenical Patriarchate and the Eastern Liturgy; and where the Greek Canon Law prevailed there the *Ecloga* pertained. Of the Greek Canon Law the Acts of the Trullan Council form an integral and a fundamental part; among them there is one which declared the equality of the Sees of Old and New Rome. The incorporation of many provisions of the Trullan Council in the *Ecloga* was not accidental, and when we find, as we do in the later versions of the *Ecloga*, including the *Procheiros Nomos*, not merely occasional references but entire chapters devoted to purely 'Greek' Ecclesiastical Law we may conclude that, as in the Balkan States and in Russia, so in Southern Italy the *Ecloga* came to be treated as part and parcel of the Greek Canon Law just as the Canon Law was itself recognized by the *basileis* as part and parcel of the law of the Empire. When the Romaic Government came to an end through the conquest of Apulia and Calabria by the Hauteville princes, Guiscard and Roger, the Romaic Law would have given place to the *Assissae* or customary law of the Norman princes but for the fact that Guiscard and his successors purposely, and for political reasons, permitted their Greek-speaking subjects to retain their liturgy and their Roman laws in so far as the latter did not conflict with the general Norman laws imposed on the conquered

territory. The *Ecloga ad Procheiron Mutata* and the *Procheiron Legum* tell us conclusively what those Romaic laws were. I may point out, too, that the more important texts of the *Ecloga* which have come down to us are bound up with the Greek Canon Law and such Acts and Decrees of Synods and Patriarchs which were applied as well to the laity as to the clergy of the Orthodox Church.

I am not aware that the *Ecloga* was ever translated into Latin for use in Italy. The close relation with the Acts of the Trullan Council and the inclusion of Greek Synodal Decrees, which were certainly not recognized by the Latins, make it extremely unlikely that anything of the kind was attempted or even contemplated. The precise part which the *Ecloga* played in the later mediaeval jurisprudence in S. Italy is the subject of some controversy.⁹

That some recollection of the old Roman law as expressed by the Code of Theodosius II and Valentinian III, and of the Code of Justinian, which the Emperor applied to Italy by Imperial Decree after the expulsion of the Goths, had survived in these distant and depopulated provinces is likely enough, if only in the form of traditional or customary *leges et consuetudines Romanorum*. As the *Ecloga* professed in Leo's own words to be founded on the laws of Justinian, the *kritai basileontes Italias* could have had no serious difficulty in administering justice to the subjects of the *basileus*, whether Italians or Greek-Byzantines, who claimed the privilege of being judged according to the Roman law as opposed to the Lombard law of Rotharis and his successors.

It remains to be said that after the Norman era the Greek population gradually faded away either by emigration or by amalgamating with their Italiot neighbours. The Basilian monasteries remained till the sixteenth century, when they were 'reformed' by a Papal Commission; and by adopting the Uniate Rite all official connexion with the Patriarch at Constantinople was brought to an abrupt end.

The introduction of the *Ecloga* into the Balkan States and through them eventually into Russia is due to the missionary enterprise of the Orthodox Church, to the zeal of Cyril and Methodius and the activities of the famous Patriarch Photius.

⁹ The student will find an admirable summary of all that has been written on the subject in a book recently published by the brilliant young jurist, the late Professor Aldo Albertoni of the University of Ferrara—*Per una Esposizione del Diritto Bizantino con Riguardo all' Italia*; pub. 1927, Imola, Co-operativa Tip. Edit. P. Galeati, 5, viale Paolo Galeati.

It is perhaps hardly necessary to say that this propaganda was actively supported, for obvious political reasons, by the Emperors Michael III of Amorium and by Basil I of 'Macedonia.' A version of the *Ecloga* in old Slav dialect, which appears to be the foundation of all the versions of the *Ecloga* found in Slav-speaking countries, is preserved in the Russian Code known as the *Kormtchaia Kniga*, where it is treated as part of the Canon Law. It has been supposed by some authorities that this old Slav version was made by Methodius himself for the guidance of the converts for whom he translated the Gospels and the Acts of the Apostles. It is as likely as not to be true.

The preservation of the *Ecloga* and the laws derived from it in these Balkan States, and indeed throughout the Ottoman territory, is entirely due to the Turkish conquest of the Later Roman Empire. The fact can be explained in a few short sentences premising that the idea of allowing their non-Moslem subjects to practise their religion and retain their own laws did not originate with the Ottoman Turks. The same arrangement had been adopted for centuries earlier by the Arab Emirs of Bagdad, Cairo, and Palermo.

Acting upon that principle the Turks classed the non-Moslem according to the religious denomination to which they belonged, Orthodox, Armenian, or Jews. So it fell out that as Bulgars, Serbs, Vlachs, Hellenes and Byzantines all professed the same Orthodox faith, they were classed as 'Greeks' and made subject to the jurisdiction of the Oecumenical Patriarch, regardless of their race or nationality. And the Graeco-Roman laws, Canon and Civil, as applied to the clergy and to the laity in regard to private personal law, continued to be applied by the Court of the Chancery of the Patriarchate as it had been by the Imperial Court of the *basileis* before the Turkish conquest.

It followed first that as each nationality, Greek, Vlach, Serb, and Bulgar, won its independence of the Turks in the course of the nineteenth century, the rulers of these newly-created nations adopted the Graeco-Roman law of the *Ecloga*, the *Procheiros Nomos*, and the revised edition in the Hexabiblos of Harmenopoulos as the basis of their new codes. John Capodistria and King Otho did so by decree. When Bessarabia was assigned to Roumania after the Great War, the Roumanian Government found the *Ecloga* still in use in that province, and it was not superseded until 1928.

When the Treaty of Lausanne abolished the Capitulations and with them the 'Millet' or religious denominational system

the Christian subjects of the Sublime Porte were made amenable to the Turkish law.

Space does not permit me to treat of the history of the *Ecloga* in Eastern Europe at greater length. I can only refer the student to Dr. C. A. Spulber's recent work, in which he will find a text and a translation, in French, of the *Ecloga*, and a series of interesting and valuable chapters on the history of the *Ecloga* in the Balkan States and in Russia. (*L'Eclogue des Isauriens. Texte Traduction, Histoire* by C. A. Spulber, Professeur à l'université de Cernautzi. Published at Cernautzi by the Librairie Muhldorf in 1929). The student should also consult the *Compte Rendu* by Professors D. Mastasijevic and Ph. Granic of the proceedings at the International Congress held at Belgrade in 1927 to promote the study of Byzantine history.

In Memoriam.

Professor COURTNEY STANHOPE KENNY, F.B.A., LL.D.

It is fitting that we should pay a tribute to the memory of a brilliant teacher and writer who had been associated with the Law Faculty of Cambridge for more than half a century. Probably none of the present generation of undergraduates ever heard Dr. Kenny lecture, for he retired from the Downing Professorship of the Laws of England in 1918, and though he subsequently delivered a course for an absent friend, that was some years ago. But some idea of his unsurpassed ability as a lecturer can be grasped by those who, in their College Law Societies, have heard Dr. Kenny read such fascinating accounts of trials as he used to give—especially those connected with the Tichborne claimant. And every candidate for Part I of the Law Tripos must have read his incomparable *Outlines of Criminal Law*. It stands in high relief against the pedestrian dullness with which this dramatic topic has usually been treated by writers. A signal mark of the high estimation in which it stands is its use in other countries as well as our own. It has been adapted to the needs of American students, and has been translated into Japanese among other languages. Besides writing reviews for the *Cambridge Law Journal*, Dr. Kenny contributed two admirable articles on the position of the British Self-governing Dominions.

CAMBRIDGE LAW JOURNAL

Published Annually by the Cambridge University Law Society.

SUBSCRIPTION PRICE 5s. PER NUMBER

Editorial Board:

*Professor P. H. WINFIELD, LL.D., St. John's, *Chairman and Note Editor.*

D. T. OLIVER, LL.M., Trinity Hall, *Book Review Editor.*

J. A. PLOWMAN, Gonville and Caius, *Assistant Note Editor.*

J. F. DRABBLE, Downing.

R. K. KERR, Trinity.

R. H. LANGHAM, Trinity Hall.

I. L. LEWIS, St. John's.

H. F. ROSSETTI, Gonville and Caius.

J. A. W. SAINSBURY, Fitzwilliam House.

L. P. WEAVER, Corpus Christi.

THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

Enquiries should be directed to B. F. MENDEL (Trinity), 1 New Square, Lincoln's Inn, W.C.2, who is Chairman of the Legal Aid Committee of the London Council of Social Service, or to the Secretary of the Free Legal Advice Bureau, Cambridge House, 131 Camberwell Road, S.E.5.

* To whom all communications should be addressed, except books for review, which should be sent to *The Cambridge Law Journal*, Squire Law Library, Cambridge.

NOTES ON RECENT CASES.

BANKRUPTCY — SETTLEMENT — TRUST TO ACCUMULATE INCOME — POWER TO SETTLOR TO DETERMINE ACCUMULATIONS AND REQUIRE UNINVESTED INCOME TO BE PAID TO HIM AND HIS WIFE EQUALLY—WHETHER POWER EXERCISABLE BY SETTLOR 'FOR OWN BENEFIT'—BANKRUPTCY ACT, 1914, s. 38 (b).

Re Taylor's Settlement Trusts; Public Trustee v. Taylor.
[1929] 1 Ch. 435.

THE short point for decision in this case was whether a power given by a settlement to the settlor to require the income of the trust fund to be paid to him and his wife in equal moieties is a power exercisable by the settlor 'for his own benefit' so as to vest in his trustee on his becoming bankrupt.

In 1913 Mr. Taylor, by a voluntary settlement, vested certain securities in the Public Trustee on trust for accumulation during his life, and the settlement contained a provision that he could, by notice to the Public Trustee, suspend the operation of the trust for accumulation and require the income to be paid as to one half to himself, and as to the other half to the lady who subsequently became his wife. In January, 1927, he gave a notice to the Public Trustee in accordance with the terms of the provision in the settlement. In July, 1927, a receiving order was made against Mr. Taylor, and in the following July he was adjudicated bankrupt.

In October, 1927, he gave notice to the Public Trustee requiring him to pay half the income of the fund to his wife, but to accumulate the other half.

The trustee in bankruptcy gave notice to the Public Trustee that he was advised that the power to appoint the income had vested in him. Thereupon the Public Trustee took out a summons to determine whether Taylor or his trustee in bankruptcy was entitled to exercise the power, and whether the notice of October, 1927, was a valid notice.

The material part of section 38 of the Bankruptcy Act, 1914, enacts that 'The property of the bankrupt divisible among his creditors . . . shall comprise the following particulars . . . : (b) The capacity to exercise and take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or before his discharge.'

Was the power in this case one exercisable for Taylor's own benefit? Eve J. held that it was not, and therefore did not pass to the trustee; Taylor was still entitled to exercise it himself.

If the power is studied it will be seen that there was nothing Taylor could do exclusively for his own benefit; he could only exercise it for the benefit of himself *and* his wife. Any benefit he did in fact acquire from its exercise would pass to his trustee in bankruptcy, but the latter had no right to exercise the power himself.

In effect, the result of the decision is to add the word 'exclusively' to the words 'for his own benefit,' in section 38 (b) of the Bankruptcy Act.

J. A. P.

BILL OF EXCHANGE—DRAWEE NOT NAMED—VALIDITY OF DOCUMENT AS PROMISSORY NOTE—BILLS OF EXCHANGE ACT, 1882, s. 3, SUB-SS. 1, 2, s. 6, SUB-S. 1, s. 83, SUB-S. 1.

Mason v. Lack. (1929) 140 L. T. 696.

PLAINTIFF claimed from defendant on an alleged bill of exchange, drawn by plaintiff and accepted by the defendant in the following form: '£125 7s. 4d. On December 31st, 1928, pay to my order the sum of one hundred and twenty-five pounds seven shillings and fourpence for value received. Accepted payable at Lloyds Bank, Ltd., High Street, Shoreditch, London, E.C.2. John H. Lack.' At the time when defendant accepted the bill there was no other name upon it. The plaintiff subsequently signed as drawer. The defendant had no account at the bank in question. The substantial defence was, that the document was not 'an . . . order in writing addressed by one person to another' within section 3, sub-sections 1, 2 of the Act of 1882, and moreover did not comply with section 6, sub-section 1 of the same Act, which provides that 'the drawee must be named or otherwise indicated in a bill with reasonable certainty.'

On these points, Humphreys J. decided in favour of the defendant, holding that not only before the Act would the above document not have constituted a valid bill of exchange, but furthermore the definition given in the Act itself now equally excluded it. (The validity of the drawer's signature being affixed after the acceptance was, of course, not questioned; see section 18, sub-section 1 of the Act.) As to the first ground, he relied on the *dicta* of Parke, Alderson and Martin BB. in *Peto v. Reynolds* (1854) 9 Ex. 410, at pp. 415-6, who, though they did not find it necessary to decide the particular question, had expressed a strong view that a bill almost identical in form with the present document could not be sued on as a bill of exchange. (Incidentally, Chalmers is wrong when he quotes (p. 22, Bills of Exchange (6th ed.)) *Peto v. Reynolds* as having definitely decided the point.) Martin B. in particular said: 'It seems to me that it is absolutely essential to the validity of a bill of exchange that it should have a drawer and a drawee . . .' (at p. 416).

Thus a point which never seems to have been seriously doubted is now finally settled.

Humphreys J. distinguished *Gray v. Milner* (1819) 8 Taunt. 739, where instead of the drawee's name, the document contained the words, 'Payable at No. 1 Wilmot-street, opposite the Lamb, Bethnal-green, London.' This proved to be the address of the person who afterwards accepted it. The acceptor was held liable, for the bill was directed to a particular place, which could only mean to the person who resided there. But here the bill was made payable at Lloyds Bank, Ltd., High Street, Shoreditch, London, E.C.2, where the defendant was proved to have no account at all. But, even assuming the defendant to have had such an account, would that have been a reasonably certain indication of the drawee, within section 6, sub-section 1 of the Act of 1882?

Though failing to establish the document as a bill of exchange, the plaintiff was allowed to amend his pleadings and claim against the defendant as the maker of a promissory note. As the instrument was clearly 'an unconditional promise in writing made by one person to

another, signed by the maker,' within section 83, sub-section 1 of the Act, judgment was given for the plaintiff on that ground.

S. R. L.

CONSTITUTIONAL LAW—DEDICATION OF CROWN LANDS—DISPUTED RIGHTS—
REVOCATION—LEGISLATIVE POWER OF STATE.

Commonwealth of Australia v. New South Wales. [1929] A. C. 431.

THE question at issue was whether Garden Island in Port Jackson was, as part of the Crown lands, under the control of the Legislature of New South Wales, or whether it was properly possessed and controlled by the Commonwealth of Australia in pursuance of a dedication to the Imperial Government for naval purposes in 1866.

The N. S. W. Constitution Act, 1855, vested the control of Garden Island (at that date part of the Crown lands) in the Legislature of New South Wales, which, in 1866, dedicated the island as a naval depot.

In 1913 Garden Island had been vacated by the Imperial Naval Authorities, and taken over by those of the Commonwealth. A dispute with New South Wales arose over terms of occupation, and the executive authorities of New South Wales in 1923 revoked the dedication, acting under the Crown Lands Consolidation Act, 1913 (N. S. W.).

The Judicial Committee held that they were legally entitled to do this.

An Imperial Order in Council, made in 1899 under the Colonial Fortifications Act, 1877, had recited an agreement made between the Government of New South Wales and the Imperial Government, by which the former, after erecting certain buildings and works (partly on Garden Island) and dedicating their sites 'in perpetuity for the use of Her Majesty's navy in the same way as Garden Island had been,' was to receive in return certain ordnance reserve lands and buildings. It appeared to Isaacs J. (one of the dissenting judges in the High Court of Australia) that reference in the Order to the dedication of Garden Island as having been made 'in perpetuity' and that the order was granted 'in consideration of the premises,' rendered necessary the consent of the Imperial Government to any revocation; furthermore that the Order even had the effect of an Imperial statute.

Their Lordships could not agree with this view. The mere recitals in the Order in Council did not purport to alter the then existing title to Garden Island, and, as to any part of the Order itself which could be regarded as having the force of an Imperial statute, they held that, acting within the Constitution, the Legislature of a self-governing colony or State is supreme, and no act of the Imperial executive Government could fetter in any legal sense the future exercise by it of its powers, or give to any person a title other than such as could be conferred under existing legislation.

A. D. C.

CONSTITUTIONAL LAW — LOCAL GOVERNMENT — IMPROVEMENT SCHEME —
PROHIBITION—HOUSING ACT, 1925, PART II.

R. v. Minister of Health. [1929] 1 K. B. 619.

THIS action arose as a result of an application to a Divisional Court of the King's Bench Division to make absolute a rule *nisi* for a writ of Prohibition prohibiting the Minister of Health from proceeding further in the matter of an improvement scheme submitted to him under the Housing Act, 1925, Part II, by the council of the county borough of Derby.

The action raises two main points—(1) Was the scheme in question a valid improvement scheme within the meaning of the Housing Act, 1925? (2) If not, did a writ of prohibition lie to the Minister, prohibiting him from proceeding with the scheme? It was decided first by the Divisional Court and then by the Court of Appeal (1) that the scheme was not a valid scheme, (2) that prohibition did lie.

The first of these two points being entirely concerned with the proper construction of the Housing Act, 1925, is of no general interest and accordingly will not be discussed here.

The second point is concerned with the question whether or no prohibition will lie in such a case. It was held (as we have seen) by the Divisional Court that it would lie. The Court of Appeal tacitly upheld this view by affirming the decision of the lower Court, but they did not discuss the point in their judgments. Lord Hewart C.J. quoted Atkin L.J. who in *R. v. Electricity Commissioners* [1924] 1 K. B. 171, said, at p. 205: 'Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs' (*i.e.* prohibition and *certiorari*). It was argued in this case, as in *R. v. Electricity Commissioners*, that the decision of the local council not being final, but being subject to confirmation (in this case by the Minister of Health), it was excluded from the category of judicial acts which, if exercised *ultra vires*, were subject to the issue of a writ of prohibition. In *R. v. Electricity Commissioners*, this view was rejected by the Court of Appeal, Atkin L.J. saying, at p. 208: 'I know of no authority which compels us to hold that a proceeding cannot be a judicial proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval.' This view of the law was followed in the present case and the rule *nisi* for prohibition was made absolute.

It is interesting to note that if the jurisdiction of the King's Bench Division had not been invoked at this stage and the Minister had confirmed the scheme, its jurisdiction would then have been ousted, as by section 42, sub-section 5 of the Housing Act, 1925, the Minister's order when made has 'effect as if enacted in the Act.' To apply for a writ of prohibition before the Minister has confirmed a scheme is, then, the only way of securing that the powers granted by the Act to local authorities and the Minister of Health be not exceeded.

H. F. R.

CONTRACT—BREACH OF PROMISE OF MARRIAGE—DEATH OF PROMISOR AFTER
ISSUE OF WRIT—CONTINUATION OF ACTION AGAINST EXECUTOR—
SPECIAL DAMAGES.

Riley v. Brown. (1929) 45 T. L. R. 613.

A WIDOW claimed damages against B. for alleged breach of promise to marry. B. died after the delivery of the statement of claim, and the action was ordered to be continued against B.'s executor, the Public Trustee. The plaintiff alleged as special damages arising from the breach (1) expenses of a flat taken at the express request of B.; (2) the giving up of a lucrative and active share in a business at the express wish of B. in order to nurse him; (3) expenses incurred for medical attendance in respect of illness caused by such nursing; (4) the costs of the action up to the date of B.'s death.

For the defence it was contended (a) that the action could not be maintained after the death of B.; (b) that, if it were maintainable, the damage alleged was not sufficient to sustain the action.

Roche J. gave judgment for the defendant. With regard to the first point, he quoted with approval an *obiter dictum* of Swinfen Eady L.J. in *Quirk v. Thomas* [1916] 1 K. B. 516, 526-7, that, though the action for breach of promise of marriage had been known even before 1651, damages had never been recovered after the death of the promisor, and it was very doubtful whether the action would lie at all in such a case, Roche J. declared himself satisfied that the contention of the defendant on that point was well founded, but owing to *dicta* in the authorities and in four American cases to the effect that such an action would lie against the executor where the promisee had suffered special damages, he declined to decide the case on the ground that the action could not be maintained at all. As to (b), he said that special damages might mean either of two things: (i) Items expressed in money which went to make up a personal claim: it was well settled that such damages would not sustain a claim of this kind. (ii) Damage of a special class which affected the estate as distinct from the person of the promisee. There were no damages of this kind in this case, which had given rise to damages more insufficient, in his opinion, than those in *Quirk v. Thomas* (*supra*), where Phillimore L.J. (at pp. 533—534) held that such damages must 'lie in the *per quod* and for loss to the estate of the plaintiff.' This test is somewhat cryptic, but at any rate Phillimore L.J. held that it ruled out any claim of the plaintiff for having given up her business, for such loss was really something by which she bought the man's promise to marry her, and was not due to his refusal to marry her.

In view of the hard knocks inflicted upon the theoretical and practical survival of this action by Lord Esher M.R. in *Finlay v. Chirney* (1888) 20 Q. B. D. 494, by Swinfen Eady L.J. in *Quirk v. Thomas* (*supra*), and by Roche J. in this case, it would perhaps be as well to advise a client never to sue it after the promisor's death.

R. G. R.

CONTRACT — GAMING — MONEY KNOWINGLY LENT FOR PURPOSE OF —
ILLEGALITY OF CONSIDERATION.

Carlton Hall Club v. Laurence. [1929] 2 K. B. 153.

THE plaintiffs, a proprietary club in London, brought an action against the defendant, a member of the club, for money knowingly lent by them to the defendant for gaming at the club. The defendant had given the plaintiffs a cheque for some of the loan, but the Gaming Acts admittedly prevented an action upon that. They consequently brought an action for the recovery of money lent.

Shearman J. held that the loan could not be recovered as the consideration for it was illegal under the Gaming Acts of 1710 and 1835.

This decision seems to be the only reasonable interpretation of the Act of 1710 (of which the Act of 1835 was a mere modification), for this Act provided that all securities for money knowingly lent for the purpose of gaming should be 'utterly void,' and it seems unreasonably perverse to hold that a security for a loan should be utterly void, but that the loan itself should remain valid. Nevertheless there was considerable authority for this perverse view. *Barjeau v. Walmsley* (1745) 2 Stra. 1249, and *Wettenhall v. Wood* (1793) 1 Esp. 18, directly adopted it. In *Robinson v. Bland* (1760), 1 W. Bl. 234, 257, it was held that money lent for gaming in a country where gaming was lawful was recoverable, on the express ground that the Act of 1710, though it avoided the security, did not avoid the loan itself. *Quarrier v. Colston* (1842) 1 Ph. 147, *Saxby v. Fulton* [1909] 2 K. B. 208 and *Société Anonyme, etc. v. Baumgart* (1927) 96 L. J. K. B. 789 are to the like effect. On the other hand, there are *dicta* the other way in *Young v. Moore* (1757) 2 Wils. 67 (action, not for money lent, but for money lost at gaming) and *Applegarth v. Colley* (1842) 10 M. & W. 723.

The present decision gives rise to some inevitable anomalies:

(1) The consideration for a loan given to make money at gaming is illegal, but the consideration for a loan given to pay money lost at gaming is legal: *Re O'Shea* [1911] 2 K. B. 981.

(2) The consideration for a loan given for gaming purposes in England is illegal on the ground that the Act of 1710 avoids the consideration as well as the security, but the consideration for a loan given for gaming purposes—say, in France—is held to be legal on the ground that the Act avoids the security, but not the consideration: *Robinson v. Bland*.

In the course of his judgment Shearman J. stated that the money in question was knowingly lent for the purpose of playing card games, 'or in paying losses incurred in playing these games' (p. 161). It must not, of course, be thought that the learned judge meant that the money was lent for the purpose of paying debts incurred in gaming, for, if this were so, his decision would be in direct conflict with the unanimous decision of the Court of Appeal in *Re O'Shea*.

S. G. C. L.

CONTRACT—HUSBAND AND WIFE—COVENANT IN DEED OF SEPARATION—DISSOLUTION OF MARRIAGE—OPERATION OF COVENANT—FRUSTRATION OF CONTRACT.

May v. May. [1929] 2 K. B. 386.

By a deed of separation between husband and wife, the husband covenanted *inter alia* to pay £600 a year to the wife during her life. Throughout the deed the words 'husband' and 'wife' were used to describe the parties.

Subsequently the marriage was dissolved on account of the husband's adultery. Payment of the annual sum fell into arrears and this was an action by the wife to recover them. Horridge J. gave judgment for the plaintiff. The Court of Appeal affirmed his judgment.

For the defendant it was contended that there was an implied condition in the separation deed that it should operate only so long as the parties remained husband and wife, and that though *Charlesworth v. Holt* (1873) L. R. 9 Ex. 38 was the other way, it would be decided otherwise if it came before the Courts now for the first time, owing to subsequent developments of the 'doctrine of frustration.' In support of this the cases *Krell v. Henry* [1903] 2 K. B. 740 and *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397 were cited. In the latter case the principle adopted was that the Court must ascertain whether the contract is made on the footing that a particular state of things would continue to exist, and that, if such were the fact, then a condition to that effect must be implied, even if none were expressed. It was urged that such a condition should be implied in this case. The argument was further supported by *dicta* in *Hyman v. Hyman* [1929] A. C. 601, which expressed doubt as to the present validity of *Charlesworth v. Holt*.

This view, however, did not find favour with the Court. Scrutton L.J. said at p. 394: 'Considering the number of years during which *Charlesworth v. Holt* has stood for law, the number of separation deeds in existence, and the number of persons living under the provisions contained in them, I do not feel able to give effect to the doubt which I expressed in *Hyman v. Hyman*, and which I still entertain.' Greer and Russell L.JJ. both held themselves bound to follow *Charlesworth v. Holt*.

The question at issue in this case was clearly one of considerable practical importance. The success of the appellant's argument, as Russell L.J. pointed out, at p. 396, would have involved the conclusion 'that every separation deed contains by implication a clause bringing to an end the operation of the deed in the event of a divorce.' It is evident that on many occasions the parties to a separation deed do not contemplate the possibility of a divorce. The Court apparently did not think that so important a departure from what had been the law for over half a century was justified by any advantages which might accrue from a change in the law.

D. R. G.

CONTRACT—ILLEGALITY—INTERNATIONAL COMITY—CONFLICT OF LAWS—
EXPORT OF WHISKY TO UNITED STATES.

Foster v. Driscoll. [1929] 1 K. B. 470.

THE plaintiff and the defendant made an agreement to ship whisky from this country into the United States contrary to the laws of that country. It was held by a majority of the Court of Appeal that the agreement was void and contrary to public policy, as its performance would constitute a breach of international comity, and would furnish a just cause of complaint by the United States Government.

The Court, in this case, had to decide (1) whether the performance of the agreement would be contrary to public policy, thereby avoiding the contract, and (2) whether this particular contract purposed to break American law.

(1) It is stated in Dicey, 'Conflict of Laws' (4th ed.), p. 620, that contracts which result merely in the breach of the revenue laws of a country are not void as contrary to public policy. Lord Mansfield says in *Holman v. Johnson* (1775) Cowp. 341: 'No country ever takes notice of the revenue laws of another.' This case and *Pellecat v. Angell* (1835) 2 Cr. M. & R. 311 concern smuggling into England. The insurance of goods to be smuggled into France was held valid in *Planché v. Fletcher* (1779) 1 Doug. 251, but it was not against public policy to evade the tariff wall aimed chiefly at this country. Modern authorities (e.g. Foote, 'Private International Law' (5th ed.), pp. 401—402) are of opinion that such cases would be decided otherwise to-day: cf. Sankey L.J. at p. 518. However, the Court took the view that Prohibition Law was not mere revenue law, but part of the general law of the country, and was unanimous that a contract of this nature was illegal on grounds of public policy. Thus in *Ralli Bros. v. Campaña Naviera Sota y Aznar* [1920] 2 K. B. 287, it was held that a contract was rendered unenforceable by a subsequent change of foreign law which made one of the terms of the contract illegal. Public policy also avoided a contract for the hire of a brougham by a prostitute for the purposes of her calling: *Pearce v. Brooks* (1866) L. R. 1 Ex. 213. The decisions seem to support Dicey, *op. cit.* p. 618, where he says that a contract is invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed. So, too, in *Lightfoot v. Tenant* (1796) 1 Bos. & P. 551, a contract was void, since its performance involved clandestine and unlawful trade in drugs.

(2) The second point was whether the contract was one to break the law of the United States or not. It was argued that the purpose of the parties might have been achieved legally by the sale of the liquor in Canada to a third party, who would perform the illegal act independently of the contracting parties. Scrutton L.J. dissenting, took this view, but the majority held that where the ultimate purpose of the contract was to break the law, the agreement was contrary to public policy. The decision in *Pearce v. Brooks* (*supra*) supports their decision. In a Canadian case cited in (1929) Yale L. J. 818, *Walkerville Brewing Co., Ltd v. Mayrand* (1928) 4 D. L. R. 500, the lease of a pier from which liquor was to be shipped to the United States was held illegal. See also 42 Harvard L. R. (1929) 436, where it is suggested that the test to be applied in such cases

is proximate causation. It seems that mere knowledge of the vendor that the goods are to be sold illegally does not bar an action (*Holman v. Johnson (supra)*), but packing of goods for the purpose has been held to avoid the contract: *Lightfoot v. Tenant (supra)*.

Support for the dissenting judgment can be found in Dicey, *op. cit.* p. 620, where he says that a contract will only be held invalid if it actually necessitates the performance in a foreign country of some illegal act. *Waugh v. Morris* (1873) L. R. 8 Q. B. 202 might appear to be in point, but it can be distinguished, as the parties had no intention to break the law, and were in fact able to perform the contract lawfully, which they ultimately did. The present case is very different, as the whole advantage to be gained depended on the ability to dispose of the whisky on American territory, where a fancy price could be obtained. The view expressed by Pollock C.B. in *Pearce v. Brooks* seems far more applicable: 'I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied.'

L. P. W.

CONTRACT—INFANT—EXCHANGE OF CHATTELS—AVOIDANCE OF CONTRACT—
INFANTS RELIEF ACT, 1874, s. 1.

Pearce v. Brain. [1929] 2 K. B. 310.

PEARCE, an infant, exchanged a motor cycle and side-car for a car, which broke down after a few days owing to mechanical defects. He sued Brain for the return of the motor cycle and side-car on the ground that the contract was void under the Infants Relief Act, 1874, s. 1, the material part of which avoids 'All contracts . . . entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities).'

There was no allegation that the defendant had been fraudulent. The Divisional Court gave judgment for the defendant.

They followed *Valentini v. Canali* (1889) 24 Q. B. D. 166, where it was held that, in spite of section 1 of the Act of 1874, it would be 'contrary to natural justice' to allow an infant to recover back money which he had paid for goods of which he had had the use and enjoyment. In that case an infant paid for and obtained possession of furniture for several months, and was held unable to recover the payment.

Swift J. held that here also the plaintiff had had some benefit under the contract, even if less than he had expected, and there was not a total failure of consideration. The exchange, he held, was covered by the words of the Act: 'goods supplied or to be supplied.' In principle there is no difference between exchange and money paid, and he was unable to distinguish between the recovery of a specific chattel under a void contract and the recovery of money.

E. N. A.

CONTRACT—INSURANCE (ACCIDENT)—MISSTATEMENTS OF AGENT—HOW FAR IMPUTABLE TO INSURERS.

Newsholme Bros. v. Road Transport and General Insurance Co., Ltd.
[1929] 2 K. B. 356.

WILLEY, an agent for the defendant insurance company, received from the plaintiffs, who wished to insure a motor-bus with the defendants, true answers to the questions in a proposal form, but he misstated the answers in filling up the form. He had no authority to fill up such forms, nor did the defendants know that he had done so. The plaintiffs signed the form, a policy was issued and the first premium accepted. An accident occurred and the defendants repudiated the policy on the ground that the written answers were untrue. The Court of Appeal held that they were entitled to do so.

The plaintiffs contended that the defendants were bound by the undisclosed knowledge of their agent. The Court, however, followed the House of Lords in disfavoured the doctrine of constructive notice in commercial cases. The agent is not so bound to impart knowledge that his principal must be taken to know it even if undisclosed (*Scrutton L.J.*, at p. 374, citing *Blackburn v. Vigors* (1887) 12 App. Cas. 531); especially where the principal is an artificial person: *Houghton's Case* [1928] A. C. 1, 18, 19.

The plaintiffs also argued that *Bawden's Case* [1892] 2 Q. B. 534 was binding on the Court. In this case a form was filled up for a one-eyed illiterate man, incapable of reading or of writing but able to sign his name, by an agent. Bawden signed a statement that he had no physical disability, yet on losing the sight of his other eye in an accident he successfully claimed as for both, on the ground that it was the duty of the agent to put the proposal into shape (*Lindley L.J.*), or to 'negotiate and settle' (*Lord Esher*). The Court, however, preferred the analogy of *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516, and distinguished this from *Bawden's Case*.

In *Biggar's Case* *Wright J.* followed the decision of the United States Supreme Court in *N. Y. Life Insurance Co. v. Fletcher*, 117 U. S. 519, that where a party signs and acquiesces in a form without choosing to read it, he must be treated as adopting the proposals. The Supreme Court (citing another case) said that 'it was in the power of the assured by reasonable diligence to defeat the fraudulent intent; that the signing of the application without reading it or hearing it read was inexcusable negligence; and that a party is bound to know what he signs.' *Biggar's Case* has been followed in other English, Scottish, and Irish Courts. The payment of a premium was held to be immaterial, as 'once a contract is reduced into writing the contract alone can be looked at as containing the terms of the contract.' Such a fact could not therefore preclude the defendants from denying any promise to indemnify the assured, once the express condition as to the truthfulness of the statements was broken.

But for *Bawden's Case* the plaintiffs' case would therefore be unarguable on grounds of precedent. The grounds of distinction from *Bawden's Case* are found in Bawden's incapacity, and the superior position of the agent. In *Biggar's Case* the agent was an agent to receive proposals, not to suggest or to invent answers. This view was adopted in the present case,

with which *Biggar's Case* is on all fours; in so far as the agent did invent answers he was the amanuensis of the plaintiff and no longer the insurance company's agent. This, combined with the full capacity of the plaintiff, who signed, was sufficient to make the signature binding as an agreement with all statements contained in the document.

R. E. B.

CONTRACT—OFFER AND ACCEPTANCE—COMMUNICATION OF ACCEPTANCE—
FAILURE OF CONSIDERATION.

Kennedy v. Thomassen. [1929] 1 Ch. 426.

No novel point of law is raised by this case. It merely instances the application to particular facts of the general principles of the law of contract and quasi-contract.

The material facts were as follow: V, an annuitant under a will, of which the plaintiffs were trustees, resided in Holland. The plaintiffs desired to redeem the annuities for a lump sum. After considerable unsuccessful negotiation with V's solicitors, the latter informed the plaintiffs that if they would make V an offer of £6,000 they would advise her to accept it, the annuities being paid to the date of the payment of the capital sum. A draft deed of release was then sent to V's solicitors for their approval in the event of V's acceptance of this offer. The solicitors caused the draft to be engrossed and sent to V for her execution. V executed it and returned it to her solicitors, stipulating that they were not to part with it until the purchase-money was paid. V's solicitors wrote to the plaintiffs stating that V had executed the release and added: 'We shall be glad to know when the matter is ready for completion.' In reply, the plaintiffs acknowledged receipt of this letter and stated that their cheque for £6,000 would be handed over to them 'in exchange for the receipt and release.'

V made a few days after having executed the release, and the notification of her acceptance of the offer of £6,000 was not received by her solicitors until after her death, and the purchase-money was paid by the plaintiffs to her solicitors, and was received by them in ignorance of her death.

The plaintiffs claimed a return of the £6,000 from V's executor.

Upon these facts Eve J. found no difficulty in coming to the conclusion that there never was a concluded contract for the sale and purchase of these annuities, and that the money was therefore recoverable. V's acceptance of the offer of £6,000 was sent to her solicitors, not as the agents of the plaintiffs, but in order that they, as her agents, should communicate her acceptance to the plaintiffs. And, as V had died before the notification of her acceptance reached her solicitors, the effect of her death was to determine the authority of her solicitors to communicate her acceptance to the plaintiffs, and the acceptance of the offer by V's solicitors having been made at a time when they had no authority to make it, no contract was ever concluded.

The judge rejected the argument of the defendant's counsel that the offer was to pay the sum of £6,000 on the execution of the release by V;

that there was what Anson calls 'an offer of a promise for an act,' so that a contract was concluded, apart from any communication of any acceptance of the offer to the plaintiffs, by V's execution of the release.

Eve J. thought it would be stretching the result of the cases referred to by Bowen L.J. in *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, far beyond what was contemplated if he were to hold that the offer in the present case was one which anybody might deem capable of acceptance by the mere execution by the vendor of the deed of release. The deed of release could only be regarded as an appropriate document to carry out the transaction.

It was also held that, even assuming that there was a concluded contract, as it was not intended that the purchase should be completed when the release was executed, but was one for the purchase of the annuities at a future date, the case fell within the authority of *Strickland v. Turner* (1852) 7 Ex. 208, and the death of the annuitant between contract and completion rendered the contract incapable of performance, in that there was no consideration which the purchasers would have received for their money.

M. H.

CONTRACT—RAILWAY—REFERENCE ON TICKET TO OTHER PRINTED CONDITIONS—NOTICE OF CONDITIONS.

Thompson v. London, Midland and Scottish Ry. Co. [1930] 1 K. B. 41.

THE plaintiff sued the defendants for negligence causing personal injuries. The defendants contended that the terms of the contract excluded such liability. The plaintiff, who could not read, bought an excursion ticket which bore clearly on its face the words 'Excursion. For conditions, see back,' and on the back were the words 'Issued subject to . . . conditions . . . in the Company's time-tables . . . and excursion and other bills.' The bills in their turn referred to the time-tables, which included conditions negating liability for injury.

The Court of Appeal affirmed judgment for the defendants.

The fact that the plaintiff could not read was held to be immaterial, for reasonable efforts had been made to bring the condition to her notice, and Lord Hanworth M.R. added that the ticket had been bought by agents of the plaintiff, who were put upon their inquiry as to the existence of the condition. But the plaintiff would probably have been bound if she had taken the ticket herself: *Mellish L.J. in Parker v. S. E. Ry. Co.* (1877) 4 C. P. D. at p. 423. These circumstances distinguish the present case from *Henderson v. Stevenson* (1875) L. R. 2 H. L. Sc. 470, where the person receiving the ticket had no knowledge, actual or constructive, that there was writing on the back, and was held not to be bound by a condition printed there.

The Court was therefore left to apply the principle recently enunciated in *Nunan v. Southern Ry. Co.* [1923] 2 K. B. 703, and previously laid down in earlier cases—that where a contract is made by the delivery and acceptance of a document in common form, which indicates clearly that there are conditions and where they may be found, the acceptor (if he

does not then and there object) is bound by the terms of the contract even if he does not read the document or acquaint himself with the conditions. Thus, in *Stewart v. L. & N. W. Ry. Co.* (1864) 33 L. J. Ex. 199, the plaintiff was held bound by a condition limiting liability for loss of luggage, because 'every man must be taken to know that which he has the means of knowing, whether he has availed himself of those means or not' (Pollock, C.B., at p. 200). As to the necessity of resorting to other documents for information, Lord Hanworth M.R. said ([1930] 1 K. B. at p. 48), 'it has not ever been held that the mere circuitry which has to be followed to find the actual condition, prevents the passenger having notice that there was a condition.'

The decision would have been otherwise if the condition in question had been an unreasonable one: *Parker v. S. E. Ry. Co.* (1876) 1 C. P. D. 618. This was not so, however: such a condition 'has existed in respect of excursion trains for upwards of half a century' (Lawrence L.J. [1930] 1 K. B. at p. 53).

Lord Hanworth distinguished *Parker v. S. E. Ry. Co.* from this case on the ground that there the document (a cloak-room deposit ticket) was irrelevant except as a receipt and for the purpose of identifying the depositor. It is difficult to understand from the report of *Thompson's Case* why there was any necessity to 'distinguish' it on this ground from *Parker's Case*.

C. S. D.

CONTRACT—DEED—VARIATION BY UNSEALED WRITING—CONFLICT BETWEEN
LAW AND EQUITY—PREVALENCE OF RULES OF EQUITY.

Berry v. Berry. [1929] 2 K. B. 316.

IN this case, by a deed of separation, a husband covenanted to pay an allowance to his wife. Subsequently, by a written agreement not under seal, the parties agreed to vary the terms of the deed. In this action the wife claimed arrears of allowance under the deed.

It was held by the Divisional Court that the husband's plea of the written agreement was a good defence to the claim under the deed.

Swift J. conceded that at common law a covenant could be varied or dispensed with only by some contract of equal value, and that a covenant under seal could be varied only by some instrument under seal. But he pointed out that the Courts of Equity have permitted the rescission or variation by a simple contract of a contract under seal, by preventing the party who has agreed to the rescission or variation from suing under the deed. In *Nash v. Armstrong* (1861) 10 C. B. (N.S.) 259, a parol agreement not to enforce performance of a deed, and to substitute other terms for some of its covenants, was held a good consideration for a promise to perform the substituted contract, although the deed was not thereby released. That being the state of law and equity the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 11, provided that 'in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.'

That provision is re-enacted in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 44. Therefore, in deciding the question whether a deed can be varied by any agreement not itself under seal, regard must be had to the equitable principles governing the matter when the rules of common law would have prevented such a thing being done.

Those principles were applied in *Steeds v. Steeds* (1889) 22 Q. B. D. 537, where it was held that the rule in equity must be taken to prevail, and the common law rule was described as 'a technicality absolutely devoid of any particle of merits or justice.'

J. C. L.

CRIMINAL LAW—ASSAULT—SCHOOLMASTER—EXTENT OF IMPLIED AUTHORITY.

R. v. Newport (Salop) Justices. [1929] 2 K. B. 416.

A schoolboy, just under sixteen years of age, was caned by the headmaster of the school which he attended as a day boy, for breaking a rule which forbade smoking in the streets. His father laid an information against the headmaster for assault which was dismissed by the justices. The Divisional Court held that they were right in so doing.

The question of the authority of schoolmasters had already arisen in *Cleary v. Booth* [1893] 1 Q. B. 465, and there it was expressly stated that the question of whether a schoolmaster has exceeded his authority may be a question of fact in each case.

From the decision before us it appears that the implied authority given to schoolmasters, which had already in *Cleary v. Booth* been extended to cover acts done by pupils on their way to and from school, is now further extended to cover all acts, or at least all acts done in a public place during term time. It is doubtful how far the fact that they are directly under the control of their parents will protect them. For, here, the act was done with the permission of the boy's father, and consequently might have been quite likely to happen whilst he was actually with that parent. It seems quite arguable that, if a boy may be punished for acts which he does with the permission of his parent, when they are against school rules, he may equally be punished when he does those acts in the presence of his parent. The point did not arise here, for the father admitted in evidence that if he had known of the rule in question he would not have allowed the boy to break it.

C. C. C.

CRIMINAL LAW — CONSPIRACY — EVIDENCE — NO DIRECT COMMUNICATION BETWEEN ALL CONSPIRATORS.

R. v. Meyrick and Ribuffi. (1929) 21 Cr. App. R. 94; 45 T. L. R. 421.

IN this case the appellants, Meyrick and Ribuffi, were convicted of conspiracy to corrupt police officers. Each of the appellants had bribed Goddard, a police officer, to make false reports in connection with clubs,

and the jury found that they had done this in pursuance of a common design; but there was no evidence that the appellants were in direct communication with each other. The appellants appealed against their conviction. The Court of Criminal Appeal dismissed the appeal.

The grounds of the appeal were, that the appellants ought to have been tried separately; that there was no evidence of conspiracy to justify its inclusion in the indictment; that this inclusion led to injurious evidence being admitted improperly.

Counsel for the appellants urged that since there was no evidence of the two appellants having communicated with each other, there could be no agreement, and hence, there should have been separate trials. The Lord Chief Justice, however, reminded them that proof of conspiracy was generally a matter of inference, drawn from common action in pursuance of a common illegal object. He quoted from *R. v. Parnell* (1881) 14 Cox C. C. 508, 515, in which Fitzgerald J. said: 'It may be that the alleged conspirators have never seen each other, and have never corresponded, one may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement.'

Thus it is a common design that is the main ingredient of conspiracy, and this amounts to 'agreement.' Whether or not any two of the parties communicate to each other their intention of pursuing this design, is irrelevant. This view is borne out by the Irish case of *R. v. Quinn* (1898) 19 Cox C. C. 78, where servants of a railway company conspired to defraud the company by selling used, but uncanceled, train tickets. Here the purchasers of such tickets were included in the same indictment as the railway officials. The gist of *R. v. Meyrick and Ribuffi* was put concisely by the leading counsel for the Crown when he said that the acts of all the accused were part and parcel of the same conspiracy revolving round the person of Goddard.

D. B. M.

CRIMINAL LAW—LIABILITY OF MASTER FOR ACTS OF SERVANT—MASTER
IGNORANT—SERVANT ACTING CONTRARY TO MASTER'S INSTRUCTIONS.

Allen v. Whitehead. [1930] 1 K. B. 211.

WHITEHEAD, the occupier and licensee of a refreshment house, received the profits but employed X to manage the business. A number of women, known by X to be prostitutes, were allowed (contrary to the express instructions of Whitehead to X) to resort to the house. Whitehead only visited the establishment once or twice a week and had no personal knowledge of what had occurred. Whitehead was charged under the Metropolitan Police Act, 1839, s. 44, which imposes a penalty on keepers of refreshment houses who 'knowingly permit or suffer prostitutes . . . to meet together and remain therein.'

The Divisional Court held that the magistrate was wrong in dismissing the charge, and that the case must go back to him for conviction of the defendant.

Lord Hewart C.J. said that Whitehead was in effect an absentee who had told X to use the discretion which he himself would have had to use

had he been on the premises. His defence that he had no personal knowledge and had not been negligent was therefore futile. The question was whether Whitehead was responsible for the acts of X, committed within the scope of X's employment. The knowledge of X must be imputed to Whitehead so as to make him liable, on the principle laid down in *Mousell Brothers, Ltd. v. L. & N. W. Ry. Co.* [1917] 2 K. B. 836, where Atkin J. said (at p. 845): 'I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.' Applying this canon, Lord Hewart C.J. said that section 44 would be rendered nugatory if the respondent's contention was held to prevail.

Avory and Branson J.J. agreed.

This case, while adding nothing new to the law, illustrates clearly the extent of the master's liability for the criminal acts of his servant. There are certain statutory offences for which the master is liable so long as the servant committed them within the scope of his employment and so long as the servant had *mens rea*. It is the state of mind of the servant that is important, not that of the master. The principle that *actus non facit reum nisi mens sit rea* is preserved by using the fiction that in such cases the servant is acting on behalf of the master and therefore the *mens rea* of the servant is equivalent to the *mens rea* of the master.

R. S. L.

CRIMINAL LAW—MENS REA—HOUSE PIGEONS—TAKING UNDER BELIEF OF OWNERSHIP—LARCENY ACT, 1861, s. 23.

Farey v. Welch. [1929] 1 K. B. 388.

FAREY and Welch each kept pigeons on their neighbouring premises. With Welch's consent, Farey entered his premises, and claimed a pigeon which Welch handed to him for examination. Farey, honestly believing it to be his, attempted to take it away, in spite of Welch's assertion (which was correct) that the pigeon belonged to Welch.

Farey was convicted under the Larceny Act, 1861, s. 23, which makes it an offence 'unlawfully and wilfully' to 'kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law.' The Divisional Court quashed the conviction.

It was argued that the conviction was right, because another section of the Larceny Act (section 21) applied to pigeons when they were the subject-matter of larceny (*i.e.*, when they are in captivity), while section 23 applied to unlawful and wilful taking, though they were not the subject-

matter of larceny. Here the appellant had acted unlawfully (for he had committed conversion) and wilfully.

Lord Hewart C.J. giving judgment, said that the question was whether, under section 23, it is an offence to 'take' a pigeon, under circumstances in which, if the thing taken were not a pigeon, it would not be larceny; or whether the section applies the law of larceny to pigeons, so far as it did not apply to them at common law. Following *Taylor v. Newman* (1863) 4 B. & S. 89, where it was held that to justify conviction there should have been guilty intention to deprive a man of his property, he held that the intention of section 23 was to bring pigeons within the law of larceny, so far as they were not subject to it already. The section was not intended to apply to cases in which there was no guilty mind.

Avory J. stated that 'take' in section 23 of the Larceny Act meant not 'take away,' but 'catch,' and was intended to apply to acts such as poaching.

By the old doctrine of the common law, pigeons were not the subject-matter of larceny, except when they were in captivity. The taking of pigeons out of a box in which they are roosting is larceny: *R. v. Brooks* (1829) 4 C. & P. 131. But it was doubtful whether it would be larceny when they were away from their boxes. To settle this point, 7 & 8 Geo. 4, c. 29, s. 33, re-enacted in section 23 of the Larceny Act, 1861, laid down that it is an offence to take pigeons when not the subject of larceny at common law.

J. J. G. W.

INTERNATIONAL LAW—RECOGNITION OF FOREIGN GOVERNMENT—SOVIET GOVERNMENT—ACT OF STATE—SALE OF CONFISCATED GOODS—TITLE TO THE GOODS.

Princess Paley Olga v. Weisz. [1929] 1 K. B. 718.

THE plaintiff was the widow of the Grand Duke Paul of Russia. At the time of the revolution in 1917 she had in her house, the Paley Palace at Tsarskoe Selo, valuable articles of furniture, pictures, etc.

In 1918 a section of the revolutionaries, whose act was subsequently adopted by the government, took possession of the palace and its contents against the will of the plaintiff, and the palace and its contents were subsequently maintained by the Soviet government as a State museum.

In 1928 the Soviet government sold part of the contents to the defendant, and on finding the articles in England the plaintiff brought this action claiming from the defendant the return of the said articles or alternatively damages for their detention or conversion.

The defence was that when the property had been bought from the Soviet government it had ceased to be the property of the plaintiff and was in the possession of the Soviet government which in 1924 had been recognized by the British Government as the *de iure* government of Russia, and since the end of 1917 as the *de facto* government; that the property had been described in the contract for sale as 'nationalized property'; and that the defendant had thus received a good title to them.

As to the title of the Russian government the defendant relied on (a) a decree of March 18, 1923, of the All-Russian Central Executive

Committee and of the Council of People's Commissaries, by which 'Works of art, antiques, and articles of historical interest being in museums and depositories as forming part of the Museum Fund and being safeguarded by State means are recognized to be State property'; (b) a decree of the Council of People's Commissaries, 1921, signed by Lenin as chairman of that body, which declared all movable property of citizens who had fled outside the confines of the republic to be the property of the Russian Soviet Federal Socialist Republic; (c) the argument that the seizure of the property, having been adopted by the government of Russia, was an act of State into the validity of which the English Court could not inquire.

The Court of Appeal held that the action failed on all three grounds. First, the decree of March, 1923, applied. Secondly, the decree of 1921 applied, because the plaintiff had escaped from Russia without a passport. Thirdly, the seizure by a government in Russia which had been recognized *de iure* by the British Government was an act of State into the validity of which our Courts would not inquire.

The Court of Appeal approved the American case of *Oetjen v. Central Leather Co.* (1918) 246 U. S. 297, the result of which is that, when a government which originates in revolution or revolt is recognized by the political department of our government as the *de iure* government of the country in which it is established, such recognition is retroactive and validates all the actions and conduct of the government so recognized from the commencement of its existence. Every foreign State is bound to respect the independence of every other foreign State and the Courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

V. S.

INTERNATIONAL LAW—SECRETARY TO FOREIGN LEGATION—DIPLOMATIC PRIVILEGE GIVES EXEMPTION FROM LOCAL JURISDICTION, NOT FROM LEGAL LIABILITY—THIRD PARTIES.

Dickinson v. Del Solar. Mobile and General Insurance Co., Ltd.
(Third Parties). [1930] 1 K. B. 376.

AN action had been brought against the defendant, Del Solar, and damages recovered for injuries caused to the plaintiff, Dickinson, by the negligent driving of defendant's motor car. Defendant was First Secretary to the Peruvian Legation, but on the instructions of his Minister had waived his diplomatic privilege. He now sought a declaration against the third parties, Mobile and General Insurance Co., with whom he had a policy of motor insurance, that he was entitled to be indemnified against any amount he might be ordered to pay plaintiff. It was held that the company was liable.

It was argued for the third parties that by reason of his privilege Del Solar was under no legal obligation to plaintiff. The waiver of the privilege was a breach of the condition of the policy, whereby the company was entitled to take absolute control of all proceedings. As to enforcing the judgment against defendant, his privilege exempted him from execution.

It was argued for Del Solar that he had submitted to the jurisdiction by order of his superior, and the company could not ask him to adopt a different attitude.

Lord Hewart C.J. held that diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction; it is the privilege of the Sovereign, and may be waived with his sanction, or with that of the official superior of the agent. *Taylor v. Best* (1854) 14 C. B. 487, and *Re Suarez* [1918] 1 Ch. 176, were followed. Therefore, it was no longer open to the defendant to set up privilege, and as he was bound to obey the Minister in the matter, there was no breach of the condition of the policy.

It was not necessary to decide the question of enforcing the judgment. In any case, execution could be levied against Del Solar when he ceased to be a privileged person. The judgment might be the foundation of proceedings against him in Peru at any time.

C. S. E.

REAL PROPERTY—SETTLEMENT UNDER A WILL—LIFE ESTATE IN TENANTS IN COMMON—LEGAL REMAINDER IN SOLE TRUSTEE—VESTING OF LEGAL ESTATE—INTERPRETATION OF LAW OF PROPERTY ACT, 1925, TRANSITIONAL PROVISIONS, SCHEDULE I, PART IV, PARA. 1.

Re Price; Price v. Price. [1929] 2 Ch. 400. 98 L. J. Ch. 417.

IN 1921 P died, and by his will left freeholds to J for life; then to E and M 'share and share alike' for their lives, and to the survivor for life; finally, to be sold and divided between certain nephews; J was appointed executrix and trustee of the will. J died in 1924, and M, her executrix, in 1925 appointed C trustee of the will in place of J. In 1929 E and M, wishing to sell the property, took out a summons, with C and the nephews as defendants, to ascertain in whom the legal estate had vested on the coming into force of the Law of Property Act, 1925.

It had to be decided in whom vested: (1) the legal remainder, undisposed of by the will. Clauson J. held that it had vested in J, as P's personal representative, on a future trust for sale, and subsequently in C, on his appointment in 1925. Therefore, immediately before January 1, 1926, C was sole trustee of the settlement; (2) the legal estate during the lives of E and M. On J's assent to P's will it vested in E and M as tenants in common; 'share and share alike' are words of severance. The Law of Property Act, 1925, s. 34, sub-s. 1, abolished tenancy in common at law; it survives as an equitable interest, the legal estate being vested in certain persons who hold for the beneficial owners upon 'statutory trusts' (section 34, sub-section 2, and section 35) as joint tenants, *i.e.* with unity of title and interest, for the simplification of conveyancing; where tenancies in common existed immediately before January 1, 1926, transitional provisions of the Act direct who those persons shall be: Schedule I, Part IV, paragraph 1.

Sub-paragraph (3) was here applicable: 'If the entirety . . . is settled land . . . it shall, by virtue of this Act, vest . . . in the trustees (if any) of the settlement as joint tenants upon the statutory trusts. Provided

that if there are no such trustees, then—(i) pending their appointment, the land shall . . . vest . . . in the Public Trustee upon the statutory trusts; . . . (iv) if, before the Public Trustee has accepted the trust, trustees of the settlement are appointed, the land shall . . . vest . . . in them as joint tenants upon the statutory trusts.' The issue was whether the land vested in C; or in the Public Trustee under proviso (i); or subject also to proviso (iv).

Clauson J. held that 'trustees (if any)' excluded 'trustee' because of the direction to hold 'as joint tenants'; therefore the land had vested in the Public Trustee; but that under proviso (iv), if C appointed a co-trustee of the settlement, it would vest in C and that co-trustee upon the statutory trusts; he continued: 'It was suggested that C has not power to make the appointment, because the land has ceased to be settled land; but that, in my judgment, will not preclude him, who before the Law of Property Act, 1925, was a trustee of the settlement for the purposes of the Settled Land Acts then in force, from appointing a new trustee of that settlement for those purposes.' (Presumably the land ceased to be settled on vesting upon the statutory trusts.) It is regrettable that the learned judge gave no reason for his opinion that C could appoint a co-trustee of an extinct settlement: it is submitted that C's power must be derived from the Trustee Act, 1925, s. 36, sub-s. 6, which enacts that a sole trustee appointed 'to act in a trust' may by writing appoint an additional trustee; it was to the trust under the will (which still subsisted) that C could appoint.

R. K. K.

REAL PROPERTY—VENDOR AND PURCHASER—IMPLIED RIGHT OF WAY—
RECTIFICATION OF CONVEYANCE—LAW OF PROPERTY ACT, 1925, s. 62.

Clark v. Barnes. [1929] 2 Ch. 368.

THE plaintiff entered into a contract with the defendant to convey to him certain land in respect of which a right of way was reputed to be enjoyed over land retained by the plaintiff. There was no express mention in the contract of the reputed right of way and there was no intention at the time of the transaction that it should be conveyed to the defendant. The right of way was exercisable over a track, part of which was scarcely visible. No reference was made to the right of way in the conveyance but the defendant claimed that he was entitled to use it by virtue of the general words in section 62 of the Law of Property Act, 1925. This provides that 'A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof . . .' The plaintiff sought a declaration that defendant was not entitled to use the right of way, and further claimed that, so far as necessary, the conveyance should be rectified by excluding therefrom any implication arising under section 62.

The Court held that the claim for a declaration must fail since the right claimed was covered by the general words of section 62. It then

pointed out that the contract contained no express stipulation that the right of way be conveyed to the defendant. The defendant was therefore not entitled to the execution of a conveyance in which the provisions of section 62 of the Law of Property Act, 1925, were to be implied since the section applied only to conveyances and not to contracts. Further, since the evidence did not show that there had ever been any intention on the part of either the defendant or the plaintiff that the right of way should pass, rectification was granted.

I. L. L.

LAW OF PROPERTY — COPYHOLD — ENFRANCHISEMENT — VESTING OF LEGAL ESTATE—JOINT TENANTS—RENTCHARGE.

Re King's Theatre, Sunderland. [1929] 1 Ch. 483.

THE facts in this case are somewhat complicated, and the decision will perhaps be more readily understood if they are simplified and set out in the form of an abstract proposition. It may be put in this way: Prior to 1922 A was admitted to copyhold land on trust to pay a rentcharge to B and his heirs, and subject thereto on trust for C and D and their heirs jointly. What is the effect of the new Property Statutes?

It will be observed that there are three interests in the land which may be affected; the legal estate of A, the equitable rentcharge of B, and the equitable interest of C and D.

By section 202 of the Law of Property Act, 1925, the enfranchisement of copyhold land under the Law of Property Act, 1922, is deemed to be effected immediately before the commencement of the 1925 Act. Therefore, for the purposes of applying the provisions of the Law of Property Act, 1925, to the facts, the Law of Property Act, 1922, must be assumed to have done its work, and the *freehold* to have become vested in A: Law of Property Act, 1922, Sched. XII, para. 8.

'If,' said Astbury J. 'the matter stopped there it would be simple enough, but this vesting . . . appears to me to be merely a transitory vesting for the purpose of bringing other sections of the Acts into operation' (p. 492).

It was held, however, that the legal estate paused in A sufficiently long to enable either paragraph 8 (d) of Schedule XII of the Act of 1922, or Schedule I, Part II, paragraph 4 of the Law of Property Act, 1925, to do its work and change the character of B's rentcharge from equitable to legal; with the result, that A's legal estate then became a bare outstanding legal estate. Whereupon it resumed its flight.

C and D are now persons entitled, within paragraph 3 of Part II of Schedule I of the Law of Property Act, 1925, to require the legal estate to be vested in them. Accordingly, it passes from A to C and D, but on trust for sale, for section 36, sub-section 1 of the Law of Property Act, 1925, provides that 'where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale. . . .' This section gives rise to a difficult question as to the point of time at which it is to be applied. But it was held that, not being a transitional provision, it did not operate until the transitional provisions had done their work.

The case illustrates the unsatisfactory nature of these transitional provisions. Although the new Acts came into force *en bloc* on January 1, 1926, yet for some purposes *this* Act or *this* section is deemed to be already in force in order that *that* Act or *that* section should operate, leaving it in doubt when the provisions of a third Act or section are to be applied. As Astbury J. remarked: 'Apart from the simplifying statutes of 1922, 1924, and 1925, the matter would be perfectly plain.'

J. A. P.

SALE OF GOODS—PARTIAL LOSS BY THEFT BEFORE DELIVERY—SALE OF GOODS ACT, 1893, s. 6.

Barrow, Lane & Ballard, Ltd. v. Phillip Phillips & Co., Ltd.
[1929] 1 K. B. 574.

THE Sale of Goods Act, s. 6, provides that: 'Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void.'

The main question in this case was whether the section applies where a part only of the goods are in existence at the date of the contract.

The plaintiffs sold to the defendants 700 bags of goods. A large portion of these had, unknown to either party, been stolen by a third person.

The plaintiffs urged that the property in the bags available at the time of sale had passed and that all subsequent loss must be borne by the defendants. The defendants argued that the 700 bags, for which they had contracted, were an indivisible parcel of specific goods, that accordingly the subject-matter had not been in existence at the time of the attempted sale and that consequently the contract was void; they would admit liability only for the bags actually delivered to them.

Wright J. giving judgment for the defendants, regarded the 700 bags as an indivisible parcel of specific goods; for the sale of 700 bags was something different from the sale of the less quantity. To compel the buyer in those circumstances to take such less quantity would be to compel him to take something which he had not contracted to take.

This case arose on a point on which there was no direct previous authority: but the opinion of Sir Mackenzie Chalmers expressed in his book on the Sale of Goods Act (10th ed.), pp. 31-32, is quoted with approval. 'Suppose a man contracts to sell to B "five dozen of the '74 champagne now in my cellar" not knowing that all but three dozen had been destroyed by fire, . . . probably the contract would be void.' The learned judge cited Pothier and Justinian's Digest (18. 1. 44) to the like effect (*uno* in the report should be *vivo*). Another line of argument for the plaintiffs was that this case was one in which they had tendered the wrong quantity of goods, and that the buyer had an option, under section 30 of the Act, of taking the smaller quantity and paying proportionately. But Wright J. pointed out that no one has an option if (as was the case here) he does not know what is being done.

H. C. E.

TORT — CONSPIRACY — BREACH OF STATUTORY DUTY — DAMAGE FROM BREACH — ACTION NOT COMMENCED WITHIN SIX MONTHS — PUBLIC AUTHORITIES PROTECTION ACT, 1893, s. 1.

G. Scammell & Nephew, Ltd. v. Hurley. [1929] 1 K. B. 419.

THE plaintiffs' business in the borough of Stepney was largely dependent upon the continuous supply to them of electrical power. The defendants were members of a committee officially delegated by the local borough council to manage electrical supplies throughout the borough. Just before the general strike, 1926, the defendants' employees, mostly members of the E.T.U. (Electrical Trades Union), proclaimed their intention of ceasing work at midnight. After discussion between themselves and with the E.T.U., the defendants managed to ensure the continuance of light, but not of power, damage thus resulting to the plaintiffs through breach of a contract entered into with the defendants. *Inter alia*, it was shown by the plaintiffs that the Government, in anticipation of the strike, had offered to supply men to keep the electrical supply going, but this was refused on the grounds that it might lead to disturbances in the district. Plaintiffs did not bring the action within six months, and the defendants pleaded the Public Authorities Protection Act, 1893.

The action was tried before Avory J. and a special jury. The jury found that the defendants were not acting in *bona fide* intended execution of their statutory duty to supply electricity, and that they were actuated by a motive to injure the plaintiffs and to further the interests of the strikers.

Judgment was then entered for the plaintiffs.

This judgment was reversed in the Court of Appeal. They held that there was no evidence to support the findings of the jury. They dealt with the case under two distinct heads:

(1) Could the defendants successfully plead the Public Authorities Protection Act? The Court agreed that they could do so. The distinction was whether the defendants had acted in the intended execution of their statutory duty, or had acted in the 'pretended' execution of it with an ulterior and dishonest motive. If the former, the Act applied, and if the latter it did not and the appeal would fail.

It was evident here that the defendants had done their best to secure the continuance of electrical supplies, because originally the workers had threatened to cease work altogether. They may have made an error of judgment in rejecting the help of the Government, but they made their decision believing it to be in the best interests of their borough.

(2) Had the defendants committed any tort at all? Greer L.J. thought not, and that there was no liability for inducing a breach of contract within the doctrine of *Lumley v. Gye* (1853) 2 E. & B. 216, because as McCardie J. said in *Said v. Butt* [1920] 3 K. B. 497, 506: 'I hold that if a servant, acting *bona fide* within the scope of his authority, procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.' The ground of McCardie J.'s *dictum* is that it is impossible for a man to 'induce'

himself to break a contract, and here the servant is the *alter ego* of the master. The other Lords Justices did not dissent from this view.

H. P. E.

TORT—DEFAMATION—PRIMA FACIE INNOCENT STATEMENT—PUBLISHER
IGNORANT OF EXTRANEOUS FACTS.

Cassidy v. Daily Mirror Newspapers, Ltd. [1929] 2 K. B. 331.

THE point at issue in this case was whether a statement *ex facie* innocent can be rendered defamatory by the existence of extraneous facts of which the publisher is unaware.

The plaintiff was the wife of one Cassidy (also known as Corrigan), who, though they did not live together, was in the habit of visiting her and was known to be her husband. The *Daily Mirror* published a photograph of 'Mr. Corrigan and Miss X [the real name is suppressed], whose engagement has been announced.' This statement was made on Cassidy's authority.

In a considered decision, the Court of Appeal (Greer L.J. dissenting), held that the publication was capable of a meaning defamatory of the plaintiff, and that she was entitled to damages, as the jury had found that it conveyed to reasonable people a reflection on her moral character.

The essence of libel is the injury done to the plaintiff's reputation. Though the plaintiff was not mentioned by name, yet she suffered damage through her friends being led to believe that she was not the wife, but merely the mistress, of Cassidy. It was argued on *dicta* of Brett L.J. in *Capital and Counties Bank v. Henty* (1880) 5 C. P. D. 539, 540, that evidence which made apparently innocent statements defamatory must be 'known both to the person who wrote the document and to the persons to whom it is published.'

Scrutton and Russell L.J.J. held that this can no longer be considered law in view of the decision in *Hulton v. Jones* [1910] A. C. 20. 'The rule is well settled that the true intention of the writer of any document . . . is that which is apparent from the natural and ordinary interpretation of the written words' [1909] 2 K. B. at p. 478.

Greer L.J., however, regarded the *dicta* of Brett L.J. in *Henty's Case* as still law, distinguishing it from *Hulton v. Jones*, where 'the writer took the risk of making defamatory statements about an individual by name when he ought to have known that it was possible that there might be a person bearing that name' (pp. 348—349).

There is probably no hardship in the rule laid down by the majority of the Court of Appeal. If I make a statement about X which, on the face of it, is innocent, I have no defence if extrinsic facts unknown to me convert this into a defamatory statement, in the eyes or ears of reasonable persons. Greer L.J. was alarmed at the prospect of a writer being held liable to X for libel, if he states that A is an ignoramus, and A, unknown to the writer, spent five years under X's tuition at Eton (p. 348). But reasonable persons might well attribute A's lack of information to natural causes rather than to defective training. It is possible to imagine extreme cases in which hardship might arise, but we need not anticipate them.

F. H. M.

TORT—DEFAMATION—QUALIFIED PRIVILEGE—INFORMATION AFFECTING A
PERSON'S INTEREST—COMMUNICATION TO THAT PERSON—DUTY TO
MAKE A COMMUNICATION.

Watt v. Longsdon. [1930] 1 K. B. 130.

THIS case raises an interesting point in connexion with qualified privilege as a defence to an action for defamation. The defendant, who was a friend of the plaintiff's wife, published to her matter defamatory of the plaintiff, that had been communicated to him. Now the wife had an obvious interest in hearing the matter, but the question was whether that was enough to confer on the defendant a qualified privilege in communicating it. The Court of Appeal in a considered (and on this point unanimous) judgment held that it was not. They held that the defendant must also have an interest in the matter communicated, or must be under a duty, legal, moral, or social, to pass it on to the defendant's wife. There seems to have been no earlier decision on the point, and previous *dicta* are conflicting. In *Stuart v. Bell* [1891] 2 Q. B. 341, 347, Lindley L.J. expressed an opinion that if a communication were made on the ground of an interest in the party making or receiving it, it would be privileged. The Court of Appeal, however, in the present case rejected this view, and accepted that of Parke B. in *Toogood v. Spyring* (1834) 1 C. M. & R. 181, 193, that a communication to be privileged must be 'fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.'

But on the question, 'What is the test of moral or social duty?' (a legal duty presents no difficulty) the Court of Appeal could find nothing better than that suggested by Lindley L.J. in *Stuart v. Bell* [1891] 2 Q. B. 341, 350, namely 'a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings . . .'; or what 'the great mass of right-minded men in the position of the defendant' would have considered it their duty to do. It is for the judge to decide whether any such duty exists.

The Court held that the question whether it is the duty of a wife's friend to communicate to her defamatory reports about her husband must depend on the circumstances of each case, the nature of the information, and the relation of speaker and recipient. They decided that in the present case the defendant was under no such duty, for the report came from a dubious source, and he had taken no trouble to verify it.

A. H. O.

TORT—NEGLIGENCE—DUTY TO TAKE CARE INDEPENDENTLY OF CONTRACT.

Humphery v. Bowers. (1929) 45 T. L. R. 297.

IN this case (which is not well reported) the plaintiff requested Lloyd's Register to make a special survey of his yacht for classification. Lloyd's Register stipulated for freedom from liability, and the

survey was conducted by the defendant, one of the society's surveyors. The society, acting upon his report, certified the fitness of the yacht. In fact, its mainmast was rotten, and the defendant was negligent in not discovering it to be so. The plaintiff in consequence incurred expense, owing to abandonment of the cruise; and he sued the defendant for negligence.

It was argued that the defendant stood in a contractual relationship with the plaintiff, since Lloyd's Register had acted as agents for the plaintiff in engaging the defendant, so as to create privity of contract between the defendant and the plaintiff. The Court, however, held that this was not so.

It was also contended that the defendant was under a duty, independent of contract, to the plaintiff, to use due care and skill in making his report, so that the plaintiff should not be injured by the certificate of survey and classification which the defendant knew would be issued by Lloyd's as a consequence of the report.

Rowlatt J. seemed to think that this amounted to the following proposition: Where A contracts with B, and B, in order to carry out this principal contract, sub-contracts with X, who knows that A will suffer harm if the principal contract is not performed, then X is under a duty to A to take care that A's contractual rights are not violated as the result of any default on X's part. Moreover, X's liability for breach of such a duty is to be measured by the amount of damages flowing from a breach of the principal contract.

The Court found that the defendant had been guilty of gross neglect of duty; but he did not owe that duty to the plaintiff; for there was no privity of contract between them, and, therefore, no contractual duty. Nor did he owe any such duty as was alleged to arise from his knowledge of the principal contract between Lloyd's and the plaintiff.

In every case of this nature the question as to whether a duty exists has to be decided by reference to the particular circumstances; and in this case the duty alleged, the damages resulting from a breach of that duty, and, indeed, all the circumstances of the case, differ so completely from those elements in previously decided cases that the two are in different spheres.

It is clear from this case that one is liable for the damage resulting from one's negligent act only to the person to whom one owed the duty, the breach of which constituted negligence; it is for the Court to say whether, in view of the circumstances of each particular case, there was a duty owed. The mere fact of a man foreseeing harm as the result of his negligent act will not make him liable for that harm, if he owes no duty to the party injured.

What is unfortunate in the decision as reported is the lack of insistence on the principle that a breach of contract between A and B is totally irrelevant to the question whether it also makes A liable in tort to C. It cannot help C's claim, but what the judgment seems to overlook is, that it cannot hinder C's claim.

E. M. T.
S. W. H.

TORT—NEGLIGENCE—DANGEROUS MACHINE—INJURY TO CHILD—LIABILITY OF OCCUPIER—TRESPASSER OR LICENSEE.

Robert Addie & Sons (Collieries), Ltd. v. Dumbreck. [1929] A. C. 358.

THE pursuer in this Scottish appeal to the House of Lords was the father of a boy four years old who was killed by being crushed in the terminal wheel of a haulage system belonging to the defenders, a colliery company. The House of Lords gave judgment for the defenders.

The accident happened in a field separated from a public road by a hedge in which there were numerous gaps. The field was to the knowledge of the company used as a playground by young children: at times the colliery officials had warned children away from the place, but their warnings were ignored. The wheel in which the boy was crushed was at the time of the accident dangerous and attractive to children and insufficiently fenced. The boy had been warned by his father not to enter the field or go near the wheel.

Lord Hailsham L.C. said that the first question in the case was the capacity in which the deceased child entered the field; whether as invitee, licensee, or trespasser. It was not suggested that the child was an invitee; could he be regarded as having been at the wheel with the leave and licence of the appellants? 'In my opinion,' said the Lord Chancellor (at p. 369), 'the findings of fact effectually negative that view. . . . I cannot regard the fact that the appellants did not effectively fence the field or the fact that their warnings were frequently disregarded as sufficient to justify an inference that they permitted the children to be on the field, and in the absence of such a permission, it is clear that the respondent's child was merely a trespasser.' This finding was concurred in by the other noble and learned Lords.

Were the company then guilty of any breach of duty to the child? 'The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care' (p. 365)—'injury either directly malicious or an acting so reckless as to be tantamount to malicious acting' (Viscount Dunedin, at pp. 276-377). The noble and learned Lords were unanimous in holding that there was no breach of this duty and that therefore the appeal must succeed.

The decision is important in two respects. In the first place, it emphasizes the rule that a person who comes on to the land of another comes, so far as the occupier's liability for injury to him is concerned, in one of three capacities: (i) as an invitee, a person who is on the land for some purpose in which he and the occupier have a joint interest; (ii) as a licensee, one who comes on the land with the occupier's permission, express or implied; or (iii) as a trespasser. Lord Dunedin points out (at p. 371) that the line that separates each of these three classes is an absolutely rigid line; in law there is no half-way house, no 'no-man's land between adjacent territories,' though when it comes to the facts there may well be great difficulty in deciding into which category a particular case falls.

In the second place, the judgment of the Lord Chancellor summarizes the duties of an occupier to persons in each of these three categories, though it must be clearly remembered that the finding of fact renders

observations concerning the duties towards invitees and licensees merely *obiter*.

(1) Towards invitees 'the occupier has the duty of taking reasonable care that the premises are safe.' This is a condensed statement of the rule in *Indermaur v. Dames* (1866) L. R. 1 C. P. 274; 2 C. P. 311.

(2) Towards licensees 'the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.' Here it is submitted with great respect that the duty is too highly stated. In the leading case of *Gautret v. Egerton* (1867) L. R. 2 C. P. 371, knowledge of the concealed danger on the occupier's part is plainly made necessary in order to render him liable: the grant of the licence to come upon the land is analogous to a gift and 'the principle of law as to gifts is that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable' (Willes J., at p. 375). See the *dictum* of the same learned judge in *Indermaur v. Dames*, L. R. 1 C. P. at p. 285. This and the *dictum* first cited were quoted with approval by Farwell L.J. in *Latham v. R. Johnson & Nephew* [1913] 1 K. B., at p. 404. In *Hayward v. Drury Lane Theatre and Moss' Empires* [1917] 2 K. B. at pp. 913, 914, Scrutton L.J. said *obiter*: 'A bare or mere licensee . . . takes the premises as he finds them, with all their dangers and traps, a trap being a danger which a person who does not know the premises could not avoid by reasonable care and skill. The owner is under no liability as to existing traps unless he intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them' (adopted by Atkin L.J. in *Coleshill v. Manchester Corporation* [1928] 1 K. B. 776, at p. 792). See also *Clinton v. J. Lyons & Co., Ltd.* [1912] 3 K. B. 198, 209, and *dictum* of Buckley L.J. in *Norman v. G. W. Ry. Co.* [1915] 1 K. B. at p. 591. On the other hand, in *Fairman v. Perpetual Investment Building Society* [1923] A. C. at pp. 86, 96, Lord Atkinson and Lord Wrenbury do not appear to regard knowledge of the concealed danger as essential to establish the occupier's liability for resulting damage to the licensee. But in *Sutcliffe v. Clients' Investment Co.* [1924] 2 K. B. at pp. 754, 755, Bankes L.J., referring to these statements of the law, said that in *Fairman's Case* it was not necessary to enlarge the liability of an occupier towards a bare licensee and that it did not appear anywhere that any of their Lordships intended to make such alteration. It is submitted, with some hesitation, that this is the correct view and that the *dictum* of Lord Hailsham in the present case must also be taken to have been made *per incuriam*.

P. M. W.

TORT—NUISANCE—OBSTRUCTION OF HIGHWAY—ACCESS TO DWELLING HOUSE.

Vanderpant v. Mayfair Hotel Co., Ltd. [1930] 1 Ch. 138.

THE plaintiff was the occupier of a private house in a quiet residential London street. The defendants opened a new hotel in the street. Vehicles coming and going to the hotel caused congestion of the road at times and the plaintiff alleged *inter alia* that access to his residence was thereby obstructed, and he sought an injunction for nuisance.

On the evidence, Luxmoore J. held that this claim failed. His Lordship laid down that the principle applicable, where the Attorney-Genreal is suing on behalf of the public to restrain obstruction of a private highway, is that the public have the right of free and unobstructed passage over the whole of a public highway, and that the owner of premises abutting on a highway is entitled to make a reasonable use of that highway for his own purposes. But the right of the public is a higher right than that of the occupier, and that if the user by the occupier in fact causes a serious obstruction to the public, then the private rights of the occupier must yield to the public rights. This principle he regarded as applicable also to an action by a private person, but, in addition, he must prove damage beyond that suffered by the general public and that such damage is direct and substantial.

In *Benjamin v. Storr* (1874) L. R. 9 C. P. 400, where the plaintiff a coffee-house keeper recovered damages for obstruction to his premises, and the smell of the defendant's horses staling outside, causing loss of custom and also discomfort, Brett J. said substantially what Luxmoore J. said above.

It would appear from this, and other authorities cited by Luxmoore J., that he regarded his statement of the law as equally applicable to cases where loss of custom is alleged. A question that was raised in argument was, 'Must the obstruction of access to a private dwelling house be such as to cause *pecuniary* damage, or is it enough for the plaintiff to prove merely that the access has been unreasonably obstructed?' It would appear from the judgment that no pecuniary loss need be shown (pp. 146-7, 154).

R. H. L.

TORT—NUISANCE—FALL OF ROCK—NATURAL DECAY AND WEATHERING—
RULE IN *RYLANDS v. FLETCHER*—ORDINARY USER OF LAND IN NATURAL
STATE—PUBLIC HEALTH ACT, 1875, s. 91.*Pontardawe Rural District Council v. Moore-Gwyn.* [1929] 1 Ch. 656.

SPECIAL Case. The defendant was tenant for life of land from which rocks were liable to fall, a fact which the plaintiff council pointed out to him. Rocks fell, and damaged the plaintiff Jenkins' house. The fall was due to weathering, and as more falls were imminent, the council served a notice on the defendant under the Public Health Act, 1875, claiming that the land came within section 91 of the Act as 'premises in such a state

as to be a nuisance,' and demanding abatement; alternatively, they alleged that it was a common law nuisance.

Eve J. decided in favour of the defendant. He based his judgment on the principle of the natural user of land, quoting the headnote of *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330: 'Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages.' Eve J. then gave, in support of his decision, *Giles v. Walker* (1890) 24 Q. B. D. 656 and *Blake v. Woolf* [1898] 2 Q. B. 426, quoting from the latter a statement by Wright J. approved by the Privy Council in *Rickards v. Lothian* [1913] A. C. 263.

It is impossible to disagree with the decision, which is less daring than either *Rylands v. Fletcher* or *Smith v. Kenrick* (1849) 7 C. B. 515. But the reasoning is confused, if not illogical. 'It is not a case,' says Eve J. 'where the landowner has erected or brought upon his land something of an unusual nature which is essentially dangerous in itself. . . . The action is, therefore, an attempt to impose on an owner who is using and enjoying his land in the ordinary manner of its use and reasonably, liability for damage sustained by the property of another through natural agencies.'

There are here three distinct bases of liability: (1) The bringing of something on to the land; (2) the essentially dangerous character of that thing; (3) the non-natural user of the land. It is usual to combine the first two of these principles, but it is unsafe to add a third without drawing a distinction carefully. Mr. Stallybrass has indeed shown (*Cambridge Law Journal*, 1927-9, Vol. III, pp. 391 *et seq.*) that in certain judgments the bringing on to the land of an unusual and dangerous object has been treated as identical with non-natural user. He rejects this assimilation, however, on the ground that many objects, *e.g.* water, cattle, which have been held to be within the scope of *Rylands v. Fletcher*, are yet usual objects.

Not only does it seem difficult to define an object 'essentially dangerous in itself'—a difficulty which has no real relevance to the present case—but equally so to define non-natural user. Mr. Stallybrass, it is true, finds a solution in a judgment of Bramwell B. in *Bamford v. Turnley* (1860) 3 B. & S. 62, 83–84, on the principle of 'mutual sufferance,' *i.e.* each landowner must tolerate inconveniences arising from the natural use of neighbouring property, since such inconveniences are approximately reciprocal. This principle seems, however, to be rather a reason for drawing a distinction than a distinction itself, and is apparently quoted in this sense by Bramwell B. In any case, it seems difficult to apply 'mutual sufferance' to occasional occurrences like the fall of rock.

It seems, however, that the doctrine of natural user of land has little real bearing on the case, since the fall of rock was quite unconnected with the user. Presumably, to whatever perverse purposes the owner of a volcano puts his land, he will not be liable for eruptions, which are not caused by his use of it.

It is worth noting that Eve J. took it for granted that the rule in *Rylands v. Fletcher* is merely a special instance of nuisance. The doctrine is, to say the least of it, questionable.

J. F. D.

WILL—CHARITY—TRUST FOR THE PRESERVATION OF ANIMALS NOT HUMAN.

Re Grove-Grady; Plowden v. Lawrence. [1929] 1 Ch. 557.

A TESTATRIX bequeathed her residuary estate to trustees upon trust for the establishment and maintenance of a charitable institution. It was to be managed by a committee and officials, who were always to have been declared anti-vivisectionists, and opponents of all sport involving the pursuit or death of any animal. Its objects were to be three, but all the judgments turned upon the interpretation of the first, *viz.*, the acquisition of land for the provision of refuges for the preservation of 'all animals, birds or other creatures not human.'

On the death of the testatrix, this originating summons was taken out to determine the validity of the disposition as a charitable trust, since otherwise it would fall to the ground as offending against the rule against perpetuities.

Romer J. held it to be a valid charitable trust as it was the predominating intention of the testatrix to provide for the protection of the lower animals from cruelty and suffering. He considered himself bound by *Re Wedgwood* [1915] 1 Ch. 113, where it was laid down that trusts for such purposes were charitable as they tended to promote public morality. He disposed of the objection that it was possible to include within the scope of the trust animals which were harmful to the human race, on the ground that in most charities of a wide character it would be possible to suggest such difficulties of discrimination, and that if the dictates of reason and common sense were followed in this case, such difficulties could easily be overcome. He also held that the condition that the members of the committee and the officials of the institution should always have been declared anti-vivisectionists must be interpreted reasonably, and if so interpreted it was unlikely that there would be any difficulty in complying with it, and it would not be reasonable to explore a trustee's views on this point from his cradle onwards.

In the Court of Appeal, Lawrence L.J. agreed with Romer J., and held the case to be covered by *Re Wedgwood*; but Lord Hanworth M.R. and Russell L.J. allowed the appeal.

Lord Hanworth M.R. in his judgment pointed out that although the expressed object of the institution was to provide a refuge for animals, which were to be free from molestation by man, yet there was no direct intimation that mankind or the community, or any part of it, were to derive any benefit from the establishment. Such benefit could only be indirect, and might be very small. According to the classification in *Pemsel's Case* [1891] A. C., at p. 583, if this trust was to be held charitable, it must come under the fourth head, that is, 'trusts for other purposes beneficial to the community, not falling under any of the preceding heads.' He held that in this case, no such benefit to the community had been proved. He distinguished *Re Wedgwood* in that in the latter case the primary concern was the removal of cruelty to animals. The trustee had, for example, suggested that he could help forward the movement for the humane slaughtering of animals. But in this proposed refuge, all creatures were to find freedom and safety from molestation and destruction by man, whatever kind of animals they might be.

Russell L.J. in effect concurred, and held that, as this was not a trust

directed to ensure absence or diminution of pain or cruelty in the destruction of animal life, there was no benefit to the community, and therefore it could not be held valid as a charity.

Thus it appears that a further distinction has been drawn as regards trusts for the benefit and protection of animals. To provide a refuge for such creatures from the hunting field is evidently not a sufficient benefit to the community for it to be a charitable object, though in previous decisions it has been held that any trust tending to restrain man's cruel instincts would be charitable: cf. 45 L. Q. R. 426—427.

R. L. M.

WILL—ENTAILED INTEREST IN CHATTELS—DEATH OF TESTATOR BEFORE 1926
—TRUSTEES AUTHORIZED BY COURT TO SELL—LAW OF PROPERTY ACT,
1925, s. 130—TRUSTEE ACT, 1925, s. 57.

Re Hope's Will Trust. [1929] 2 Ch. 136.

A TESTATOR who died in 1912 by his will settled certain chattels, including three family portraits, to be held upon trusts which should, as nearly as the rules of law and equity permitted, correspond with the limitations of real estate in tail, and set out such limitations at length, but settled no real estate upon the same limitations.

The question was whether the trustees, with the consent of the tenant for life, could sell the chattels under section 130 of the Law of Property Act, 1925, or, if they had no such power, whether the Court would authorize them to sell the chattels.

The Court granted power to sell under the Trustee Act, 1925, s. 57, which enables the Court to do this if it is considered expedient, where the trustees have otherwise no power to alienate. It held also, that there was no power of sale under the Law of Property Act, s. 130, which related only to personal chattels settled without reference to settled land (the case in point) on trusts creating an entailed interest therein, and also provided that: 'An entailed interest shall only be capable of being created by a settlement of real or personal property or the proceeds of sale thereof (including the will of a person dying after the commencement of this Act).' No entailed interest having been created by the will of the testator, who died before January 1, 1926, section 130 was not applicable.

In view of the decision of the Court it is difficult to see that sub-section 5 gives any powers that are not already conferred by sub-section 1. If 'personal estate so entailed (not being chattels settled as heirlooms) may be invested, applied, and otherwise dealt with as if the same were capital money or securities representing capital money . . .' sub-section 1, taken in conjunction with sub-sections 4 and 7 of section 75 of the Settled Land Act, 1925, apparently covers sub-section 5. It may be, however, that the word 'invested' limits the meaning of 'applied and otherwise dealt with,' and by implication confines 'personal estate' to money or securities.

I. L. L.

WILL—LIFE INTEREST IN RESIDUE TO WIDOW—FAILURE OF ULTIMATE TRUSTS—INTESTACY ON DISCLAIMER BY WIDOW OF LIFE INTEREST—ADMINISTRATION OF ESTATES ACT, 1925, s. 33, SUB-S. 5, s. 49.

Re Sullivan, Dunkley v. Sullivan. [1930] 1 Ch. 84.

A TESTATOR, who died in 1928, devised and bequeathed all his real and the residue of his personal estate, including musical copyrights, to trustees upon trust for his wife for life with a gift over to his children. The trustees were directed to capitalize the copyrights as they came in and to pay the income to the wife. The testator died leaving no children, so that the ultimate trusts failed. The trustees applied to the Court for the decision of the question whether the widow, if she executed a disclaimer of her life interest under the will, would be entitled under the resulting intestacy and the Administration of Estates Act, 1925, to a life interest in the residuary estate, and whether in that event the royalties in respect of the copyright or other interests comprised in the estate should be treated as income or capital.

For the next-of-kin it was urged that the case was covered by section 49 of the Administration of Estates Act: 'Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of *subject to the provisions contained in the will.*' Even if the widow disclaimed, there would still be an effective disposition of part of the property; therefore by virtue of section 49 the residue which was undisposed of would go to the widow subject to the provisions in the will for the capitalizing of the royalties.

Maugham J. held that the widow upon executing a disclaimer would be entitled to a life interest in the residue including the royalties. The learned judge based his decision on the grounds: 1. That the provision respecting the royalties had not been inserted by the testator with a view to determining the nature of the interests to be taken in property as to which he should die intestate, but for the benefit of the children who in the event did not exist. 2. That section 49 referred only to provisions in the will which remained operative.

This case is of interest as being the first decision on sections 49 and 33, sub-section 5 of the Administration of Estates Act. Royalties being in the nature of wasting property even apart from the express direction in the will, the trustees would, under the Rule in *Howe v. Earl of Dartmouth* (1802) 7 Ves. 137, have been bound to convert them as they came in and to pay only the income arising from the authorized investments to the tenant for life. But the sole beneficiary, disclaiming all benefits under the will, an intestacy ensued whereupon section 33, sub-section 5 of the Administration of Estates Act comes into operation: 'The income . . . of so much of the real and personal estate of the deceased as may not be disposed of by his will, . . . may, *however such estate is invested, . . . be treated . . . as income.*' This section was held to exclude the Rule in *Howe v. Earl of Dartmouth*.

J. A. W. S.

BOOK REVIEWS.

Lex Aquilia (D.ix.2, *Ad legem Aquiliam*). Text, translation and commentary. On Gifts between Husband and Wife (D.xxiv.1, *De donationibus inter virum et uxorem*). Text and commentary. By JAMES B. THAYER, Cambridge. Harvard University Press. 1929. 226 pp. (10s. 6d.)

THERE are many signs that interest in classical law is growing in the United States, and this book is a very welcome further evidence. It is not easy to see why two such dissimilar topics are bracketed, or why the less familiar one has no translation, or why the notes are in one case assembled at the end and in the other subjoined to the individual texts.

The author has read widely and critically: he has considered the many problems which arise in connexion with the two topics and has reached independent conclusions; no one will accuse him of being addicted 'in verba iurare magistri.' His arguments are often convincing and always acute. To discuss them in detail would be to write a book on the *l. Aquilia*: it must suffice to say that a reader who has worked through the commentary will have learnt much. But he will have had no easy task. Mr. Thayer has tried to say much in little space, with the result that he is often obscure. Several passages still remain dark to the reviewer; though this is no doubt partly his own fault, some of the blame must be laid on the author. He is extraordinarily allusive, and attributes to his reader the same familiarity with the literature as he himself has gained by intensive study. On a certain point in *consumptio litis* (p. 56) he gives Levy's theory on the point, which he does not accept, and adds that Savigny's theory is the most appealing, but sends us to Savigny to learn what it is. On the preceding page he says of a certain passage that it negatives Ihering's generalization, but does not tell us what this generalization is—Ihering gave us several—or even where it is to be found. It does not seem too much to say that an intelligent use of this book needs the resources of a great library. It is better fitted for Seminar purposes than for independent reading.

The translation is accurate and clear, but it is here and there 'tendencious.' In 9.2.23.2 the word '*etiam*' is rendered by the colourless word 'even' to make it express what the writer then thought to be the doctrine of the jurist. The last words of 23.9 are not translated, but interpreted, as are the words '*aut serraculum ad navem ducendo*,' in 29.2. In 37.1 the 'merely' and 'also' of the translation are not in the text, and are quite unjustified. In 51. pr. the words '*ab alio ictu*' are translated as if they were '*ex alio ictu*.' Here the translator follows predecessors. It is interpretation, suggested by *h.l.* 2. But the discussion has been cut down. Julian seems purposely to have used a very general form, and a translation should give us what he says.

The author accepts (p. 68) the view of von Thur that the back reckoning under the *l. Aquilia* had no penal aim, but was to facilitate proof, and he reproaches Levy with having 'inexplicably' ignored this opinion. It is hard to find anyone who has not followed the same 'inexplicable' course. To credit a legislator of that age with preoccupations about

difficulty of proof, a matter on which the Romans of all ages showed remarkable insouciance, is fantastic. It does not account (notwithstanding von Thur) for the fixation of different periods. It is noticeable that Mr. Thayer himself says elsewhere (p. 86) that the shorter term shows a desire for a 'milder treatment.'

The author once or twice objects to an argument that it ignores the maxim '*plus est in re quam in existimatione*' (pp. 74, 173). It might be replied that this objection ignores the maxim '*plus est in opinione quam in veritate*' (D.29.2.15). Neither maxim is authority for anything.

It is sometimes uncertain whether the author is criticizing a text as a statement of the Roman law or the Roman law as an expression of reason. In 9.2.52. pr. Alfenus says what implies that if a slave who is wounded dies from lack of skill in the doctor, or negligence of the owner, the wounder is not liable for killing. Here, says the author, Alfenus commits the error (still common) of failing to distinguish between intervention of the doctor and that of another person: his action caused the doctor's intervention and so the death, but not directly. This is not peculiar to Alfenus. Paul says much the same in *h.t.* 30.4, not distinguishing who is negligent, so that it is here the Roman law which is to blame. It is difficult to see why negligence of the doctor should be more or less imputable to the wounder than negligence of the owner who, seeing that the wound is likely to become septic, lets the slave die. On the author's view both wounder and doctor have killed. The distinction between *causa causans* and *causa sine qua non* will not always work: they merge into each other. But it can hardly be doubted that as a rough guide it will often serve, and did serve the Romans. The wounder was *causa causans* of the doctor's intervention, but not of his negligence. No doubt the Roman theories of causation were defective: so are ours. The author says rightly that it is a question of remoteness. It is always a question of remoteness, for the more we probe the question of causation the nearer we get to the view that every event is a cause of every other event. The distinction between direct and indirect cause does not seem much more manageable than the *causa causans* theory, at any rate, if we have to hold that the wounder was the direct cause of the doctor's want of skill or care, but not of the owner's negligence.

The author holds (p. 141) that *mancipatio* admits of express conditions. Papinian plainly denies this in Vat. Fr. 329 and again in D.50.17.77 (and in both texts adverts to tacit conditions which can '*inesse*'). No text mentions such a thing. No recorded *mancipatio* contains one. *Malo errare cum Papiniano*. The common law has no monopoly of dodges for circumventing, on occasion, an inconvenient principle. The argument by which the author supports his view is one of the '*leges damnatae*' in the commentary to which reference has already been made.

There are signs of change of opinion as the author progressed. As we saw, the complete rejection of a penal element in the back reckoning is modified later. (The author's views about the back reckoning in general need clearer statement.) In the translation of 9.2.23.2 the word '*etiam*' is rendered 'even' to express a certain doctrine. In the commentary it has become 'also,' as it ought to be. He has come to see that there might be something besides the *hereditas*, though his special views on back reckoning make him limit this, as it seems, unduly. On p. 174 he accepts the view that *possessio* as such was not a *res*. On p. 211 he holds that it is a *res* on account of the notion of *furtum possessionis*. What

authority is there for this notion outside Justinian's definitions? No text ever describes a case as one of *furtum possessionis*. In the cases to which the name is commonly applied the losses brought into claim are never things inherent in possession *per se*. G. 3. 200, in which these cases are discussed, shows the true standpoint. Of course the tendency to treat *possessio* as a right, and therefore a *res*, is clear under Justinian, and no man knows when it began.

A few misreferences and misleading misprints may be noted. In the note to 9.2.11.6, for 2. pr. read 21. pr. On p. 73, l. 23, for 'exception' read 'explanation' (?). In the first line of 24.1.5.1 the words 'mulierem et' are omitted. On p. 179, ll. 11, for 24.3 read 23.4. On p. 197, l. 15, for 'vivos' read 'quos.' On p. 219, at foot, the reference is in some way wrong. On p. 221, l. 21, for 32 read (presumably) 31, though the passage does not justify the author's statement.

For so elaborate a discussion comment on individual texts is not a convenient method. Such interest as the *donatio* title has is outside its immediate subject. If the author would dissolve the partnership and convert his notes on the *l. Aquilia* into a continuous commentary, he would produce a more readable book. He would be compelled to systematize his doctrines. Incidentally, he would probably revise some of them.

W. W. B.

Year Books of Richard II: 13 Richard II, 1389-1390. Edited for the Ames Foundation by THEODORE F. T. PLUCKNETT, M.A. London, LL.B. Cambridge, late Research Student of Emmanuel College, Assistant Professor of Legal History in Harvard University. London: Spottiswoode, Ballantyne & Co., Ltd. 1929. lii and 205 pp. 1—166 in duplicate. (31s. 6d.)

WE welcome Professor Plucknett's successful edition of the Year Books of Richard II for several reasons, and mainly because it marks a revival in Year Book study which is a guarantee of scholarly and accurate editions, and because it is a valuable and reliable contribution to our knowledge of the legal history of the period.

Following on the lines of the Selden Society, he gives us transcripts and translations of the Record, a concordance with the Old Abridgments, Tables of Cases, Statutes and Forms of Actions, Indexes of Matters, Persons and Places, and headnotes.

Bearing in mind that the Year Books are the ancient ancestors of our law reports, how should we proceed to review such a publication? How can we do justice to the Introduction and the text? We have sampled a good number of the cases; the text and the translation are set out with all possible care and accuracy, manifesting great ability and industry.

The Introduction must be our main concern, for here Professor Plucknett discusses the nature and origin of the Year Books at various periods; the rise of copyhold tenure and its protection in law and equity; the decline of manorial institutions; the relation of bailiff to bailee; and the position of women at common law.

A word for word collation of the four principal manuscript Year Books of 13 Richard II shows a striking similarity in their text and arrange-

ment, forcibly suggesting that they are all ultimately derived from the same complete Year Book text. This presents a strange contrast to the bulky and numerous manuscripts of Edward II's reign, of which Maitland himself confessed the 'limits of collatability.' There is a further distinction in the contents and style. These differences are attributed to the fact that Edward II's reign was a creative period of the common law, judges were dispensers of new law, new statutes had to be interpreted, and the decisions dealt with matters of momentous importance. These were eagerly awaited by the pleaders, and consequently were independently reported by many hands; these reports were borrowed, copied, enlarged and abbreviated to such an extent that reports of the same case were beyond the pale of collatability. By the time of Richard II the creative period was coming to an end, the business of the common law court was fixed and settled within well-marked bounds. Much statute law had been assimilated and embodied in the common law. The wide discretionary powers had been curbed by legislation, discretion was fast becoming judicial. Counsel's preliminary arguments to raise the issue had improved and were more logical. Law reporting had become a regular practice and, perhaps, somewhat professionalized. The 'tantalizing gaps' and the collatability of the report suggest to us a small band of reporters. 'It may be that some sort of advance sheets may have been circulated and then used (together with the comments of the profession, or of selected readers), for the compilation of the full year' (p. xxviii). The cases were few in number, but their quality was much improved. Yet there is no evidence to support Plowden and Coke's story of the 'official reporters'; reporting was left to depend on the initiative of the pleaders. Maitland once suggested that the earliest Year Books were something in the nature of 'students' notebooks.' Upon further research he changed this view, and these Year Books of Richard II justify his later theory. There may be some evidence for Dr. Bolland's views about the mediaeval capitalist and his *scriptorium*. Turner's 'pamphlet theory,' based on the manuscript Year Books of Edward II, is a sound one in so far as it explains the problems of that period, but Professor Plucknett submits it is inapplicable to the later Year Books. It is safe to conclude that the final word about the origin of the Year Books and the many other controverted points in connexion with them can be pronounced only when the whole series has been carefully edited.

Professor Plucknett's discussion of *Philippot v. Wade*—a case which the Court took a whole term to consider—deals with the gradual transition from the mediaeval to the later copyhold tenure. The freehold was the lord's, and his decisions as to the rights of his tenants could not be the subject of a false judgment. Thirning J., however, referred to a case in the King's Bench where a writ was awarded upon the lord's absolute refusal to entertain a plea, to compel him to do so (pp. xxxii—xliii, 122—4). There is an early instance of a successful action on the case for waste by the Abbess of Shaftesbury against her customary tenant at will by copy of court roll. True, he could have been ejected, and her forbearance for six years is directly connected with the difficulty of securing sufficient labour service for her manor (pp. xliii, 108). One factor in the decline of the manorial court was that payment by the tenant in that court of a nominal fine was a bar to the lord from obtaining substantial remedies at Westminster (pp. xlv, 70).

The rule was established that where a deed of feoffment is made to

four persons, three of whom receive livery of seisin in the absence of the other, that other cannot disclaim by parol. 'This decision shows a deliberate break with the older idea of seisin and of the paramount importance of what passed at the ceremonial livery, and a tendency towards the modern respect for the written instrument' (pp. xlix, 3—6). Reference is made to a tenant under a lease being *seised* (p. 89). In a writ of trespass against a member of a religious house, it seems that the defendant need not answer if the master is not named. It is worthy of note that this religious house is now St. John's College (p. 91). In an action of detinue to recover charters bailed, it was held to be no defence that some of the charters belonged to others besides the plaintiff—a bailee is estopped from denying his bailor's title (p. 134).

An interesting case on the Statute of Labourers raised the question of what is 'reasonable cause' within the statute for a servant to leave his master before the expiration of the term of service (p. 31).

We shall look forward to the future publications of the Ames Society under the able general editorship of Professor Plucknett.

T. E. L.

Edward Coke. By HASTINGS LYON and HERMAN BLOCK, of the New York Bar. Boston and New York: Houghton Mifflin Co. 385 pp. (\$5.)

EVERY Cambridge law student should as in private duty bound know something of the career of Edward Coke, undergraduate of Trinity College from 1567 to 1571, High Steward of the University of Cambridge in 1614. Whatever difficulties formerly lay in the way of acquiring such knowledge have now been removed by the authors of this book. It is to be regretted that they did not include a bibliography and that they did not purge the text of some traces of floridity. But when this has been said nothing but praise is due for what they have done for us. They have given us a readable account, not only of the life of Coke, but also of the doings of other great lawyers in the days when the number of great men in proportion to a population of five million was such as to astound us.

Students of English legal history will naturally turn to the account of Coke's contests with two great Chancellors, Thomas Egerton, Baron Ellesmere and Viscount Brackley, and Francis Bacon, Baron Verulam and Viscount St. Albans. These conflicts were primarily a chapter in the struggle between Crown and Parliament concerning the prerogative, but there were personal antagonisms in the background. The story of the sale of a jewel by Glanvil to Courtney is told on page 195, with the sequel of the intervention of the Chancellor, who was then (1615) about seventy-six years of age and thought to be dying. Coke's exact part in the proceedings is not known, but it was clearly a prominent one, for Bacon, then Attorney-General, replied to King James' request for a report that he counted the conduct of the Chief Justice 'a kind of sickness of my Lord Coke that comes almost in as ill a time as the sickness of my Lord Chancellor.' He described Coke's conduct as 'a great public affront, not only to the reverend and well-deserving person of your Chancellor and at a time when he was lying on dying, which was barbarous, but to your High Court of Chancery, which is the court of your absolute power.' He

adds, however, that for reasons of State his opinion is plainly that 'my Lord Coke at this time is not to be disgraced.' As is well known, the King sustained the Chancellor's jurisdiction, and Coke's behaviour was brought to the notice of the Court of Star Chamber, which disapproved his conduct.

Almost at once followed the case of commendams, which is told on pp. 200—201. The King's order to Coke and the eleven other Judges, signed by Bacon, is quoted in full, as is the reply signed by all the Judges. A description is given of the appearance of the Judges before the King and of the course taken by Ellesmere and Bacon. It seems that the two latter got into trouble with the King for excess of constitutionality in their proposals for dealing with Coke. He was, in fact, subjected to the humiliation of reporting to Ellesmere and Bacon, assisted by certain serjeants, on the revision which he had been required to undertake of his Reports, with a view to purging them of erroneous opinions concerning the prerogative. On November 15, 1616, he was dismissed from the Chief Justiceship by royal fiat. In 1620 he was elected member for Liskeard, more than a quarter of a century since he had last sat in the House of Commons. It was not long before he got his opportunity of turning the tables against his old opponent Bacon, who had received the Great Seal in 1617. On March 15, 1621, Sir Robert Phelips, in the House of Commons, openly accused the Chancellor of corruption, and the House ordered Coke and others to draw formal charges, the consequence of which is well known. It is interesting that the authors of the book under review conclude on examination of the evidence that Bacon was a most unfortunate rather than a morally guilty man. They add that Coke grew to respect the legal abilities of his rival. But the latter's genius was beyond Coke's ken. 'To him Bacon's work on the foundations of scientific method was sheer folly. When Bacon presented him with a copy of the *Novum Organum* part of his great plan of the *Instauratio Magna*, and so entitled, Coke wrote on the title-page—

Edw. C. ex dono auctoris
Auctori Consilium
Instaurare paras documenta sophorum
Instaura mores iustitiamque prius.'

The translation which follows is not the best part of the book!

In the last twenty pages will be found a short account, useful to students, of Coke's writings, and of *Shelley's Case*, in which he was junior counsel for the defendant in 1580 at the age of twenty-seven.

H. A. H.

The King's Republics. By H. J. SCHLOSBERG. London: Stevens & Sons, Ltd. xx and 147 pp. (7s. 6d.)

THE author tells us that this book contains a statement of 'the views of an average Nationalist' upon the present status of the British Dominions and the results of the Imperial Conference of 1926. He examines the legal effects of the recent changes, first from the international point of view, and, secondly, from the internal constitutional point of view. To most of what he says little or no objection could be taken except by those who refuse to recognize the importance of the events

of the past eleven years in developing the status of the Dominions and in defining the relations between the different self-governing units of the British Commonwealth of Nations, including Great Britain and Northern Ireland.

In his chapter on the 'Right of Neutrality,' however, we find ourselves unable to accept his views. No one denies that any Dominion is entitled to remain morally and politically neutral in the event of the British Empire becoming involved in war. That has been so for over half a century. Not all the self-governing Dominions and Colonies took part in the South African War. The point is, however, whether to-day a Dominion has the right to remain legally neutral without seceding. The author perceives that to establish this right his best chance is to invoke the Personal Union between England and Scotland from 1603 to 1707 and between Great Britain and Hanover from 1714 to 1837 (during which period Hanover was at war without Great Britain being involved). Accordingly he asserts (p. 30) that 'the present position of the King in his relation to the various Britannic States is legally almost exactly similar to the position of George I as King of Britain and Elector of Hanover.' Assertion is not enough, and arguments in support of the assertion are lacking. Surely between 1714 and 1837 there were two Crowns, one British and one Hanoverian, which an accident of birth had temporarily placed upon the same head; the two States had a common King but he wore two crowns. From 1837 onwards, owing to the fact that the Salic law prevailed in Hanover, those two crowns were worn by two different persons, one male, the other female. This is a far cry from Mr. Schlosberg's 'common Crown' existing for the British Commonwealth of Nations. We believe that the view that the British Crown is 'one and undivided' is more in accordance with the facts of the situation, and we find difficulty in classifying the British Commonwealth of Nations as a Personal Union, which Oppenheim defined as occurring 'when two sovereign States and separate International Persons are linked together through the accidental fact that they have the same individual as monarch.'

We submit that the correct view is that a declaration of war delivered by a foreign State to His Majesty King George would involve the whole of the British Empire in the legal condition of war, and, conversely, that in a war declared by him upon the advice of any of his Cabinets the whole Empire would, as a matter of law, be involved, though there is a tacit agreement that he would not declare war without consulting all his Cabinets.

Moreover, we find it difficult to reconcile Mr. Schlosberg's assertion of a legal right of neutrality (presumably without first seceding) with his statement (p. 32) that the 'common allegiance of all subjects of his Britannic Majesty to a single Sovereign . . . ' . . . 'carries with it also a common nationality.' How could some British subjects be at peace and others at war?

The book is an interesting piece of work which will stimulate thinking upon a number of unsolved problems, but we do not think that the author, a lawyer, has entirely succeeded in the difficult task of distinguishing between law and politics.

A. D. McN.

International Law: A Treatise by L. OPPENHEIM, M.A., LL.D.
 Vol. I, Peace. Fourth edition. By ARNOLD D. MCNAIR,
 C.B.E., LL.D. London: Longmans, Green & Co. 1928.
 1 and 827 pp. (42s.)

THE debt which students of International Law already owe to Dr. McNair as editor of the series of *Contributions to International Law and Diplomacy* is very considerably increased by the recent appearance of the fourth edition of vol. i, Peace, of Oppenheim's International Law. In form as well as in substance, improvements on the third edition have been effected, partly by an occasional change of type, partly by relegating to the footnotes facts and opinions which have been modified in the last ten years, or have lost their former value, and partly by adding, either in the body of the text, or in note form at the bottom of the page, the changes of opinion and of fact which are gradually modifying what Sir John Fischer Williams has called the 'Old International Law.'

Professor Oppenheim's work, marked by characteristic clarity of style and definite expression, gains rather than loses by this treatment. To the student of International Law the value of a text-book which offers a dynamic as well as a static view of International Law cannot be over-estimated, and it is difficult to conceive of a more effective method of attesting the vitality of International Law. One illustration will suffice. Oppenheim's *dictum* that 'States solely and exclusively (apart from the League of Nations) are the subjects of International Law,' which, in Oppenheim's opinion, embodies one of the most essential features of his teaching, is emphasized again and again in his work, partly because its importance was in his view fundamental, partly to correct the occasional modern jurist who in his lifetime disputed it. The footnotes at the bottom of page 22 in the new edition call the reader's attention to a phalanx of twentieth century jurists who no longer accept Oppenheim's unqualified view. 'The attitude,' says Dr. McNair, 'is gaining ground that while States are the exclusive authors of International Law, or, as it is sometimes put, the exclusive organs of international legislation, yet International Law, and particularly conventional International Law, sometimes does directly confer rights and impose duties upon individuals and juristic persons other than States, in which case they become *quoad hoc* subjects of International Law.' Dr. Lauterpacht has recently suggested that this view is allied to Westlake's on personal responsibility, without 'which there can be neither sound International Law nor sound International politics'; it is supported by the recognition of international personality in new bodies like the League of Nations and in the self-governing Dominions, 'which will with difficulty satisfy the old rigid conceptions of an International person'; and by 'the recognition of the protection of human personality and welfare as one of the functions of International Law.' Dr. McNair's clear and concise note does not fail to call the reader's attention to the support which may be found in modern thought and modern practice for Oppenheim's view. Reference is made to Lord Phillimore's opinion, and to Art. 34 of the statute of the Permanent Court of International Justice, which declares that 'Only States or members of the League of Nations can be parties in cases before the Court.' It is the reader's fault if this well documented note does not,

when read in conjunction with Oppenheim's original statement, present to him an idea of a living and moving body of legal opinion and practice.

The section on the Status of the Self-Governing Dominions, by using Earl Balfour's distinction between status and function, helps towards the understanding of their complicated constitutional and international positions; that on the Mandated areas asks and answers the question so frequently asked, 'Wherein does the Mandate System differ from the old-fashioned annexation?'; while the section on the League of Nations, which Professor Oppenheim wrote in 1919, has been almost entirely redrafted and considerably extended, and valuable sections on the defects and merits of the League have been added. These and other sections on the equality of States, the Lotus Case, the Locarno Pact, the frequent references to recent decisions by international tribunals, and the retention of the bibliographical notes which formed one of the most characteristic features of Oppenheim's work make this edition, with Dr. McNair's up-to-date additions, one of exceptional value to teacher and student alike.

M. G. J.

Crime and Punishment in Germany. As illustrated by the Nuremberg Malefactors' Books. By THEODOR HAMPE. Translated with an Introduction based on WM. SMITH'S 'Brief Description of Norenberg' (1594) by MALCOLM LETTS, F.S.A. London: George Routledge & Sons, Ltd. 1929. viii and 175 pp. (10s. 6d.)

To students of the history of criminology and criminal law this work, based on scholarly research, will be instructive. The author has examined with much care the Nuremberg archives of the sixteenth and seventeenth centuries; and, on the basis of a remarkable collection of criminal records, he has written a book which increases our knowledge of crime and the administration of criminal justice during an important period in the history of European criminal law. Among several interesting points brought out by this group of records is the horror with which criminals, even those who were most degraded, looked upon death by hanging; to them death by the sword was sometimes viewed as a boon and even as an honour. The book not only presents human nature in some of its darkest aspects and reveals the social aspects of crime in a realistic and startling manner, but it discloses enlightening points in regard to Charles V's criminal code (the famous 'Carolina'), the attitude of the Church to crime and punishment, modes of punishment (including execution), sanctuary, and many other legal aspects of the subject. The translator's introduction gives us a picture of Nuremberg in the period covered by the book; the author's preface presents us with information on materials similar to those which he has himself used; while his introduction is an account of the manuscripts upon which the present volume is based. Some of the excellent illustrations with which the book is provided, all drawn from reliable sources, depict certain well-known criminals of the time, instruments of torture and punishment, various methods of execution and punishment, and similar 'gruesome relics' of the past; while other illustrations, more cheerful, are views of Nuremberg in the period covered by the work. The translator has added a few notes for the benefit

of English readers who may have no previous knowledge of the subject-matter of the volume.

H. D. H.

The Law of Banks and Banking, Clearing Houses, Currency and Dominion Notes, Bills, Notes, Cheques and other Negotiable Instruments. By JOHN DELATRE FALCONBRIDGE, M.A., LL.B., K.C., Dean of the Osgoode Hall Law School, Toronto. Fourth edition. 1929. Toronto: Canada Law Book Co., Ltd. lxi and 980 pp.

EVERY law library in England ought to have a copy of this admirable book; we know of no other work on these subjects which is comparable to it. We only regret that the two sections on Banking and on Bills of Exchange have not been published in separate volumes, for as a rule these subjects are not taught in a single course in this country.

To the English reader the part dealing with bills of exchange will naturally prove the more valuable, as the Canadian law in substance follows the Act of 1882, although the numbering of the sections has been altered. Of this change Dean Falconbridge says, 'while in a few cases the arrangement was improved, in other cases the rearrangement was quite inept and the result was distinctly confusing.' The English reader will, however, encounter no difficulty in finding his way about the book, and his efforts will be rewarded by what is probably the best and most learned dissertation on the subject. The author has not limited himself to Canadian and English cases, but has also included a number of references from the United States. As a result, this book is most useful from the standpoint of comparative law. The English lawyer, who is faced with a novel point on which there is no authority, may find here a reference to a Canadian or American case which, without being binding, may prove to be persuasive.

To the teacher this book is a gold mine, for Dean Falconbridge has read and digested all the leading articles which have appeared in recent years. Thus in his criticism of *R. E. Jones v. Waring and Gillow* [1926] A. C. 670 he cites Professor Aigler's persuasive article in the 1927 Yale Law Journal, and the note in 3 Cambridge L. J. on p. 84. Of even greater value are the author's own comments, for he has not hesitated to suggest proposed amendments in the law where it is ambiguous or faulty.

It is not possible in a short review to discuss the numerous points raised by Dean Falconbridge in Chapter LII, in which he considers in fifty closely reasoned pages the sections of the Act dealing with the Conflict of Laws. If anyone needs convincing on the subject, this chapter will prove to him that the present law is inadequate. The learned author suggests that 'what is required is concurrent legislation by the British Parliament and by the Legislatures throughout the British dominions, and such legislation would have to be preceded by the preparation of a model statute.' We hope that in that case Dean Falconbridge will be chosen as draftsman for in this book he has proved himself a model authority on the subject.

A. L. G.

Annual Digest of Public International Law Cases. Years 1925 and 1926. Edited by ARNOLD D. MCNAIR, C.B.E., LL.D., Fellow of Gonville and Caius College and Lecturer in the University of Cambridge, Barrister-at-Law, and H. LAUTERPACHT, LL.D., Dr. Jur., Dr. Sc. Pol., Assistant Lecturer in International Law in the London School of Economics and Political Science. London: Longmans, Green & Co. 1929. xlv and 497 pp. (35s.)

THE editors of this volume are to be congratulated on a notable achievement. Prompted by the belief that there is more International Law to be found in the decisions of Courts 'than this world dreams of,' they set themselves the task of digesting all the judicial decisions involving points of International Law which were delivered, whether by national Courts or by international tribunals, in the years 1925 and 1926. Assisted by a strong advisory committee and an expert staff of contributors representing every important State, they have collected a mass of material which exceeded their own expectations. A 'classification' of the content of International Law (which significantly assigns to war and neutrality but one 'Part' in eleven) has been devised, and on this framework has been hung, in the form of digest familiar to English lawyers, the facts and decisions in about two hundred cases decided in national Courts and in over a hundred and fifty cases decided in international Courts and tribunals. A comprehensive digest of this kind becomes for the first time available, and is the more valuable since the original reports of foreign cases are often inaccessible, and English translations non-existent. It is to be sincerely hoped that this 'experiment' will meet with the success that it deserves, and that the series will not only be taken back, as the editors intend, to 1919, but continue to flourish indefinitely.

The question will be asked, Of what value is such a compilation likely to prove, at any rate to the practising international lawyer? What degree of authority or law-making influence is to be attributed to the decisions here digested? The answer of the editors is modest enough. They put forward no exaggerated claim as to the value of case law, but confine themselves to the remark 'that in any field of human activity it is impossible for one mind faced with the task of solving a problem not to give weight to the solution of a similar problem which has commended itself to another mind elsewhere. That is not a principle of law, but of common human experience.' This series will at least co-ordinate and preserve, in accessible form, the judicial experience of the past. But even though it be granted that judicial decisions are assigned a subsidiary place as sources in the Statute of the Permanent Court, and are not binding in International Law, their importance must not be minimised. Dr. Lauterpacht, one of the co-editors, in the current number of the *British Year Book*, points out that the decision of even a national Court involving a question of International Law is a declaration by the competent and most disinterested organ of the State of the interpretation of the law adopted by that State, and as such is a valuable source of 'international custom, as evidence of general practice accepted as law.' This article, 'Decisions of Municipal Courts as a Source of

International Law,' forms an admirable introduction to the volume under review.

The editors suggest as a method of citation of cases in this volume, Annual Digest, 1926—1927, Case No. —. When the series has definitely established itself and it is possible to assign numbers to the volumes, may we suggest as less cumbersome for a work that will be in constant request, the citation 3 A. D. No. —?

B. E. K.

La Terminaison et la Dissolution des Traités. Par ARNOLD D. McNAIR, Conférencier de l'Université de Cambridge, Fellow de Gonville and Caius College. Académie de Droit International (extrait du Recueil des Cours). Paris: Librairie Hachette. 1929. 80 pp.

THIS excellent course of lectures, written in French, was delivered at The Hague Academy of International Law in the summer of 1928. The author divides his subject into two parts, termination by the effect of law, and termination by the act of one of the parties, and explains his method in a brief introduction. He will follow the English tradition, attaching more importance to practice and the case law of international tribunals than to the works of writers on International Law. In this way he proceeds, skilfully inducing his principles from the available material, and drawing especially upon recent examples and decisions, many of which are culled from the pages of the Annual Digest of Public International Law Cases, 1925—1926, reviewed elsewhere in this issue.

This method has one defect. In dealing with any particular point a principle may be overlooked, or unnecessarily stressed, according to whether it is absent from or fortuitously illustrated in the material under examination. The otherwise excellent treatment of the application of the doctrine '*rebus sic stantibus*' may be mentioned to illustrate this. The author thus formulates the rule: 'When a treaty contains no provision fixing its duration, and it can be inferred that it was concluded by the contracting parties upon the basis of certain circumstances then existing, a vital change in these circumstances may have the effect of dissolving the treaty.' Is the absence of a provision fixing the duration of the treaty really necessary for the application of this doctrine? The case of *Rothschild et fils c. le Gouvernement d'Egypte* (p. 16) so decides. But if the analogous doctrine of 'frustration' is remembered, it is difficult to see why, in principle, an implied condition by the parties as to the continuance of a certain state of affairs should necessarily be ousted by the inclusion of a specific term. A more serious omission, however, is the failure to emphasize the fact that the doctrine only applies to 'executory' and not 'executed' or 'transitory' treaties. This is indeed pointed out in a footnote on p. 11, but it is submitted that the distinction is just as vital here as in dealing with the effect of war on treaties, where the case of the *Society for the Propagation of the Gospel v. Town of New Haven* (p. 39) secures for it its due importance. It may even be suggested that this distinction forms the true line of division between the legal and the political spheres of application of the doctrine.

This work, besides being an admirable exposition of the English legal

method to a Continental audience, goes some way to fill a conspicuous gap in the literature of International Law. No comprehensive work has yet appeared on treaties, since Crandall ('Treaties, their Making and Enforcement' (2nd ed. 1926)) deals mainly with the treaties of the United States. May we be permitted to hope for a fuller treatise on this subject from the pen of the learned author? There is no one more competent to undertake the task.

B. E. K.

L'Arbitrage International. Le Règlement Judiciaire du Conflit de l'Alabama. Par EGIDIO REALE, Docteur en Droit. Memoire présenté pour le diplôme de l'Institut Universitaire de Hautes Études Internationales, Genève. Lausanne: Libraire Payot et Cie. 1929. 141 pp.

DR. H. LAUTERPACHT in a recent article ('Economica,' December, 1928, No. 24) would have us allow that there is no foundation in law for the distinction which is often made between justiciable and non-justiciable disputes. He examines the various distinctions which have been made and comes to the conclusion that the only true difference is the willingness or otherwise of the parties concerned to submit their dispute to arbitration or judicial decision. As an illustration of a dispute which vitally affected the 'honour' of both parties, in which the interests at stake were considerable, regarding which the rules of International Law were far from clear, and which was yet settled satisfactorily by arbitration because the parties so willed, the history of the Alabama Claims Arbitration fully bears out his thesis. Dr. Reale here sets out forcibly the story of this dispute, from the outbreak of the War of Secession in 1860 to the final award of the Tribunal of Arbitration in 1872.

This most important of all arbitrations, with the Treaty of Washington which preceded it, was not only a great victory for the principle of arbitration, but was a considerable source of International Law and precedent, and forms a model for all future arbitral proceedings. The history of each new principle adopted is here traced, until almost invariably it is accepted in international practice, or expressly adopted in The Hague Conventions for the pacific settlement of international disputes. The adoption of one precedent is deplored, that of permitting dissentient awards or judgments where, in the author's opinion, unanimity is essential to give moral authority. This practice is adopted in the Statute of the Permanent Court of International Justice, although it had been expressly rejected for arbitral proceedings in The Hague Convention of 1907. The author calls this a triumph of the 'English judicial tradition,' but it must be remembered that this is not the practice of the one British Court competent to adjudicate between States—the Judicial Committee of the Privy Council.

On first reading the author's Introduction and Conclusion, one is apt to think that he has exaggerated the importance of this arbitration, which 'affirms for the first time the principle which should be the very basis of civilization—that for nations, as for individuals, the way of justice is the sole path of honour.' On further reflection, one doubts if this is possible.

An amusing misprint may be noted on p. 136. The same sum is expressed in pounds and dollars respectively as 3,200,000£, and £15.500.000. Sir Alexander Cockburn, the British member of the Tribunal, figures indiscriminately throughout as Sir A. Cockburn or plain Sir Cockburn.

B. E. K.

Anglo-Saxon Wills. Edited with translation and notes by DOROTHY WHITELOCK, M.A.; a volume in the series of Cambridge Studies in English Legal History produced under the direction of Professor HAZELTINE. Cambridge University Press. 1930. 243 pp. (15s. net.)

THOSE who rejoice to see a sound piece of scholarship achieved by a woman have the opportunity of helping towards the recognition of merit by buying this book. It contains thirty-nine Anglo-Saxon wills, so called, with translation and notes. The documents belong to the tenth and eleventh centuries. The author was Allen Scholar of the University of Cambridge and Marion Kennedy Student of Newnham College. Her work is sponsored on the linguistic and antiquarian side by Professor Chadwick, and is introduced by Professor Hazeltine in one of his masterly prefaces. Some such preface was a vital necessity, for otherwise the title of the book and the text of the documents would have misled readers into thinking that the Anglo-Saxons made wills in the usual sense of the term. Professor Hazeltine warns us that they did not. Germanic legal transactions consisted of spoken words and formal manual acts: the introduction of documents based on Graeco-Roman models did not eliminate these features. The document became usual, it is true, but it was evidentiary only and not dispositive. Even at a later date our common law remained true to its Germanic origins. It made no requirement that legal transactions of any kind be done in writing as a condition of jural validity: only by legislative action were requirements of written form introduced into our system. So these so-called wills were evidentiary records of dispositive formalities orally transacted, and not dispositive documents as are our own wills. Nor did Anglo-Saxon testaments possess the revocable character of ours. They were irrevocable contractual gifts, to be perfected after the death of the donor by delivery to the donee. Even this description is dangerous, for the word 'gift' must be understood in a sense other than ours. It was a deep-seated Germanic idea that a gift required a counter-gift or counter-performance, however slight that might be. This fact can readily be illustrated from the Anglo-Saxon 'will.' The principal donees *post mortem* were ecclesiastical institutions, and donee and donor were traffickers. 'The men of this world want things in the next; while the men of the next world want things in this. By their gifts the lay folk buy things in the spiritual world; and by their counter-gifts and counter-performances the clerical folk buy things in the corporeal world. Rights in terrestrial possessions are exchanged for rights in the heavenly mansions.'

It may be added that the student who wishes to plunge into the maze of Teutonic law will find guide-posts in plenty in the numerous references given in the footnotes.

As a legal journal we are primarily concerned with the place of these documents in the story of law. But we must not be understood to forget the laborious and scholarly textual criticism which makes possible the illuminative speculation of the legal historian.

H. A. H.

The Sovereignty of the British Dominions. By A. BERRIEDALE KEITH, D.C.L., D.Litt. London: MacMillan & Co., Ltd. 1929. xxiv and 524 pp. (Price 18s.)

THE author is well known for his views on the status of the Self-Governing Dominions. He has no doubt that any permanent pronouncement of their constitutional position is still far from being capable of achievement. He has in this book surveyed historically the growth of dominion sovereignty, its extent and its limitations, and at the same time presented his opinion of the present position. He deals in the latter connexion with internal before external sovereignty. The result is a balanced review for the benefit of the ordinary reader. The specialist no doubt can and will criticize. Moreover, the still more recent report of the conference on the operation of dominion legislation and merchant shipping law has accentuated the doubts which some will feel in accepting the author's opinion on many of the issues raised, but not decided, at the last Imperial Conference. This report will doubtless come up for consideration by the forthcoming conference to be held in the autumn of the present year. Not even Professor Keith's most advanced critic will expect its contents to be accepted without modification.

We are inclined to the opinion that Professor Keith lays too great emphasis on two facts with regard to the report of the Inter-Imperial Relations Committee (the Balfour Report) of 1926, namely, (1) that it has not been approved by the Parliaments of the Empire (except that of the Union) and (2) that it has not been communicated to foreign Governments as a declaration of the British view of the Constitution of the Empire. The author would be the first to admit that what depends largely on convention for its successful operation cannot readily be reduced to formal statement. Of this the tone and length of the report itself is evidence. What purpose could have been served by formal discussion in the various Parliaments of the Empire? What form could the communication to foreign countries have taken? He is on surer ground perhaps when he deplores the omission of the full statement of the relations in the italicized words of the report, which gave such prominence to the main proposition declaring autonomy and equality of status. The report itself in terms concedes (but not in italics) 'that the principles of equality and similarity appropriate to status do not extend to function.' It is interesting to note that the late Lord Balfour, to whose draftsman-ship the report is commonly attributed, subsequently admitted that the same value attaches to both propositions. But in the absence of equal prominence to the two propositions the italicized declaration of autonomy is certainly misleading as a device to secure Imperial co-operation.

Professor Keith rejects decisively the argument that the British Empire is now a personal union of States, on the ground that, as the King can

do nothing save on the advice of his Ministers, advice received from Dominion Ministers must needs be submitted to His Majesty's Ministers in London. It is difficult to controvert this argument so long as the seat of the Home Government remains also the permanent residence of the Monarch.

Students of Constitutional Law will be interested in two minor points brought out by the book. The first casts doubt upon the accuracy of the Privy Council's decision in *Re Lord Bishop of Natal* (3 Moo. P. C. (N.S.) 115), as violating the principle of *Campbell v. Hall*, which only deprives the Crown of legislative power over conquered colonies where a representative Legislature has been conceded. In the second place the history of the Halibut Fisheries Treaty, 1923, is given in its proper perspective, which robs the occasion of much of the importance with which it has been clothed.

E. C. S. W.

The Austinian Theory of Law and Sovereignty. By R. A. EASTWOOD, LL.D., and G. W. KEETON, M.A., LL.M. Methuen & Co., Ltd.

WHEN the keen mind of Austinian criticism blew through the wilderness of English law, juristic thought reaped a double advantage. Some giants of the forest, notably the theory of Natural Law, withered before the blast, and a healthy stimulus was given to an inquiry into the nature of law and sovereignty. Austin's answer to the former was marked by the supreme merit of simplicity, and as a mere test of law—it professes to be no more—it serves its purpose admirably, in spite of much severe criticism; 'Whatever else law is it is at least a command.' Austin nowhere denies that it is something more. The inquiry to-day is developing on the lines, 'What else is it?' The views of modern writers like Duguit, Jellinek, Stammler, Ehrlich, and others are briefly summarized in Vinogradoff's 'Historical Jurisprudence,' vol. i, chaps. vii and viii.

It has unfortunately become the fashion to belittle Austin, but his work remains the starting point of all investigation in the Anglo-American school of jurisprudence. Austin faces facts with a courage, honesty, and lack of mysticism that is a valuable object lesson, yet there is an undoubted tendency to neglect him. Very useful, then, are such books as that under review, which furnishes the law student with an admirable resumé of Austin's main doctrines and the various criticisms they have evoked, together with a reasoned reply that admirably sums up the matter.

Bain says 'The commanding heights of knowledge are achieved by the detection of the like in the midst of the unlike,' and the attempt to establish jurisprudence as a general science is an ambitious but unconvincing effort to scale those heights. It has been well said, 'The only general jurisprudence is particular.' We may, indeed, discern resemblances, but the variants of national character, geographic and economic circumstances, make any approach to constant general conceptions impossible.

Austin's theory of sovereignty is a singularly infertile field of speculation, but our authors have added a useful and interesting historical sketch of the development of the twin notions of sovereignty and state,

showing clearly how 'the despotism of an ulterior purpose' has dominated each writer. Austin had not the excuse of a political purpose, yet he mis-called legislative sovereignty, sovereignty; and confused the international, political and legal aspects of his subject in an unpardonable fashion. International sovereignty we must admit, as it is the foundation of international society, but if we must cling to sovereignty in the legal sphere, it can only be with modifications that Austin would not accept. Alternatively, there is the theory that the State itself is sovereign, functioning through organs which may or may not wield sovereign power, depending on the Constitution. Or we can adopt the view that sovereignty has played its part as a factor in State development, and can find no place in the democracies of to-day. A government in every State is an unassailable proposition, while sovereignty is an elusive will-o'-the-wisp. MacIver's 'The Modern State' is an excellent example of the latest thought upon the subject, but it is to be feared that the ordinary law student would not find it a congenial grazing ground. For such the little book before us is to be heartily recommended. It has a novel feature in a recommendation that follows each chapter as to where further information upon each topic can be obtained. Let us hope that this valuable help will meet the success it deserves.

C. H. L.

Personal Actions at Common Law. By RALPH SUTTON, M.A.
 London: Butterworth & Co. 1929. xv and 220 pp.
 (12s. 6d.)

MR. SUTTON has done good service to students, teachers, and practitioners by the publication of this book. Its chief merit is not that there is anything especially original in it, but that it makes available in one place a great deal of information that is scattered in works of various age and still more various degrees of intelligibility—e.g. Stephen's Pleading, Tidd's Practice, Chitty's Pleading, the treatises of Bullen & Leake and Cunningham & Mattinson, Fitzherbert's *Natura Brevium*, and that monument of great learning and repulsive literary technique, Williams' Saunders. Of course, Sir William Holdsworth has here, as elsewhere, covered most of the ground in much greater detail, but the plan of his *History of English Law* makes it necessary to consult nine volumes, and, until the appearance of a synthetic Index, this is a matter that requires some time.

It would be superfluous to add much to what Mr. Sutton himself says as to the necessity of knowing something of an extinct system of procedure if we are to understand the meaning of decisions rendered under that system and their exact bearing on the present law. It is enough to say that nothing will absolve the veriest beginner from grasping the procedural points in many of these earlier cases at the outset of his studies. More important is the consideration of the way in which the problem of explaining the older actions is to be attacked. The first thing to do is to make clear the meaning of terms which convey absolutely nothing to the modern reader. This is not a difficult task, and a good deal could be done in this direction if one went no further than Blackstone and *Termes de la Ley*. What is infinitely harder is a second step, and that is trying to find out

why a thing was done in one particular mode rather than in another. Here the old books of practice are, mainly because they were books of practice, lamentably deficient. We constantly find that procedure took this or that form without the slightest hint as to the reason for it, and it is only by close examination of the reports that the puzzle can be solved, if it is to be solved at all. The learned author has easily achieved the first of these objects and he has done much towards accomplishing the second. To expect more would be to misunderstand the scope of the book. Thus his explanation of the preference of *indebitatus assumpsit* to debt (p. 29) is good as far as it goes, but it does not account for the extreme popularity of the former action when once it was invented. The trite quotation in many books that it was a 'liberal action' leads us nowhere. Further and better particulars are to be found under the following references: *Moses v. Macferlan* (1760) 2 Burr. 1005, 1010; *Orton v. Butler* (1822) 5 B. & Ald. 652; *Young v. Marshall* (1831) 8 Bing. 43, 44; *Owen v. Challis* (1848) 17 L. J. C. P. 266; *Ashmole v. Wainwright* (1842) 2 Q. B. at p. 845. See, too, Samuel Warren's *Introduction to Law Studies* (2nd ed. 1845), 320—321.

One or two points for consideration in the next edition may be suggested. We should decline to recommend to anyone the speeches of two of the noble and learned Lords in *The Amerika* [1917] A. C. 38 as historical studies without also referring him to Holdsworth's *History of English Law*, iii, 676—677; cf. 29 *Columbia Law Review*, 252—254. And on the same page (30) there ought to have been a reference to the Fatal Accidents Act, 1846, as a qualification of the statement that the death of an individual gives no right of action to anyone. Another qualification is embodied in *Jackson v. Watson* [1909] 2 K. B. 193. On p. 62, an unnamed case, which is presumably *Oleghorn v. Oldham* (1927) 43 T. L. R. 465, is cited as undoubtedly one on trespass. The report, however, shows it to be one on negligence.

P. H. W.

The British Year Book of International Law, 1929. Tenth year of issue. Humphrey Milford, Oxford University Press. vi and 338 pp. (18s.)

ALTHOUGH it has only existed for ten years this annual publication is already an established institution with high traditions. As must clearly be anticipated from a glance at the list of distinguished persons who appear as the staff responsible for its production, the present volume fully maintains these traditions; indeed, it incorporates a new feature of a most welcome kind in the form of a General Index to all the volumes so far issued. There are twelve articles, of which there is only space to mention one or two. Sir Cecil J. B. Hurst writes on the case of *Engelke v. Musmann*, and discusses modern developments in the sphere of diplomatic immunities. The present tendency of world politics is to multiply tribunals, conferences, and even secretarial bodies of an international character, whose members may plead the same necessities for immunity from local jurisdiction as have been recognized for the older classes of diplomatic agents. Questions of difficulty are likely to arise, especially in cases where the immunity operates adversely to the rights of individual

subjects of the State which grants it. It may be that States will have to develop their sense of voluntary responsibility for the conduct of their agents in proportion to the increase in the sphere of immunity. As to what persons are entitled to this privilege, the author holds that the final decision must rest with the Executive Government and not with the Courts. Dr. Lauterpacht writes of the decisions of municipal Courts as a source of International Law, and supports his opinions by voluminous references which will be of value to students interested in other points besides those of the article itself. There is an article on the Mandate for Palestine, which is of special interest in that it is from the pen of the Attorney-General of the Government of that country. Professor H. A. Smith deals with the legal position arising from the injurious effect on Canadian interests of the diversion of the waters of Lake Michigan at Chicago. It is sad to see that death has taken a heavy toll of international jurists since the last volume of the Year Book, and obituary notices take up an unusually large number of pages. One section of the Year Book is devoted to interpretation of the decrees, opinions, and awards of international tribunals in 1928, and another comprises a digest of the recent decisions of the English Courts which involve points of International Law.

J. W. C. T.

*Lectures on Legal Topics.** Vol. VI. Association of the Bar of the City of New York. Macmillan & Co., Ltd. (21s.)

THIS book consists of a number of addresses delivered before an audience of practising lawyers of New York City. Many of them are purely of American interest, though some of them are well worth reading by the English lawyer. Professor Williston has contributed an address worthy of attention on the repudiation of contracts dealing particularly with the effects of anticipatory breach.

In view of the coming visit of the Bar to America, it is of interest to read the address on the visit to England of the American Bar. It contains a number of misconceptions. For instance, it explains the difference between barristers and solicitors, and adds that the Law Society 'is vested by statute with power to admit members to the Bar, and it regularly conducts examinations to determine their qualifications. It also has power to disbar solicitors.' Nevertheless the article gives evidence of admiration of the English law and lawyers. The majesty of English legal administration impressed the writer. Our visitors found less delay in the administration of the law, and they spoke highly of the way in which counsel handled the evidence in Court, contrasting it with the constant wrangling over technical points of evidence which took place in their own Courts. Admiration for the English system is also shown in an address on the Press and the Courts. It condemns the American practice of 'trial by newspapers,' whereby a party is practically convicted in the newspapers before trial in Court. This was contrasted with the English system of controlling the Press by proceedings for contempt.

The book concludes with an article on the Bolshevik Constitution, but as might be expected, fails to bestow a blessing upon it. There is no State organization, only a class organization, partisan in character.

J. R. R.

Roman Law in Medieval Europe. By PAUL VINOGRADOFF.
Second edition by F. DE ZULUETA. Oxford: Clarendon
Press. 1929. 155 pp. (5s.)

THANKS are due to Professor de Zulueta for his assistance in the preparation of a very welcome second edition of this excellent book. It shows in miniature the late author's powers at their highest. The student will find in the chapter on the decay of Roman Law not merely an illuminating sketch of the barbarization of Rome and Roman law in the West in the later Empire, but will also be able better to appreciate the legal degeneration which set in at Rome during the fourth and fifth centuries, from the account given of the debased systems of the early Middle Ages. Other chapters give a clear outline of the history of the revival of jurisprudence in the eleventh century, and of the influence of Roman Law in France, England, and Germany. That the book is attractively printed goes without saying, but there is one slip reproduced from the first edition on page 65, where the sense requires the word 'affirmative' instead of 'negative.'

J. W. C. T.

The Law of Income Tax. By E. M. KONSTAM, K.C. Fourth edition. London: Stevens & Sons, Ltd. lxxii and 672 pp. 1929. (£2 2s.)

* THIS book is written 'for the use of the taxpayer and his advisers,' and its usefulness is proved by the demand for four editions within nine years. Apart from its legal merits, the ordinary taxpayer with a developed sense of humour may gain some rueful amusement from the book. He will note the continued authority of Lord Macnaghten's *dictum* in 1901 that 'Income tax . . . is one tax,' and will then observe that Mr. Konstam, a skilful writer who does not waste words, requires over 400 pages of text to expound the law of this simple thing. He will readily believe that the tax is the reputed child of statute when he sees that it takes a further 217 pages merely to set out the Income Tax Acts and Statutory Orders now in force. And when he has perused them and then finds that the Table of Cases which the author is compelled to quote in order to interpret these Acts runs to 60 pages, he will doubtless agree with Earl Loreburn that 'the language of the different Acts is not coherent. You may strain the language to mean either one thing or the other. You must strain it to arrive at any conclusion.' It is doubtful, however, if he will consent to regard as anything but judicial irony the view of another learned Judge that the mischief is to be attributed to 'very indifferent drafting.' For the taxpayer is convinced that there is a deliberate policy behind all this confusion and obscurity. In any case, we are sure that both the taxpayer and his advisers will be grateful to Mr. Konstam for his valuable assistance in a matter of great perplexity.

J. W. C. T.

Die Höchsten Gerichte Der Welt. By Justizrat Dr. JULIUS MAGNUS. W. Moeser Buchhandlung, Leipzig. 1929. 634 pp.

Die Rechtsanwaltschaft. By Justizrat Dr. JULIUS MAGNUS. W. Moeser Buchhandlung, Leipzig. 1929. 536 pp.

THESE two books are companion volumes, identical as to format. The first has been produced as a tribute to the German Supreme Court on the occasion of its fiftieth anniversary. It consists of a collection of reviews of the supreme courts of appeal in most of the countries of the world, together with the Rota Romana and the Permanent Court of International Justice. Naturally a fuller account is given of the German Courts than of any others, but in most cases the articles on the foreign Courts have been written by native lawyers and translated where necessary into German. The British contributions are, as to the House of Lords, by Mr. R. E. L. Vaughan Williams, K.C., and Mr. Ralph Sutton, and as to the Judicial Committee of the Privy Council and the Dominion Courts, by Mr. W. R. Wallace. As far as can be judged the work has been done carefully and accurately for each of the countries dealt with, and a useful reference book is the result.

Dr. Magnus' aim in the second of these books has been as far as possible to obtain from representative lawyers in each country of the world a general account of the history, organisation, and status of the legal profession in that country. The position in Great Britain and Northern Ireland is again ably described by Mr. R. E. L. Vaughan Williams and Mr. Ralph Sutton, while Mr. Everard Dickson represents the Dominions and Colonies, and Sir Bastanta Mullick British India. There are in addition sections dealing with the history of advocacy in Roman Law and also in German Law, a chapter on advocacy by women and an article discussing the establishment of a bar of international lawyers. There are some misprints in this volume, especially in the English section of the bibliography, which contains a number of typically continental blunders.

J. W. C. T.

Odgers' Digest of the Law of Libel and Slander. Sixth edition. By W. BLAKE ODGERS and ROBERT RITSON, Barristers-at-Law. Stevens & Sons, Ltd. 1929. cii and 824 pp. (£2 2s.)

It is nearly fifty years since the first edition of this work, and it has long been regarded as a classical exposition of this branch of law. New editions of such books normally call for little comment, but the present one necessarily attracts attention, as it is the first to appear after the death of the original author. It must be said at once that the new editors have fully maintained the standard of the past: they have indeed performed the somewhat difficult task of reducing the book slightly while yet including the recent cases of importance decided not only in our Courts but also in those of the Dominions and of America.

The Digest proper is contained in Part I, consisting of two-thirds of the whole. Part II is a valuable treatise on Practice Procedure and Evidence in civil cases; Part III deals with Practice and Evidence in criminal cases; and there are three Appendices on Precedents, Legislation as to Libels in Newspapers, and Statutes, respectively. The editors are content to state the law as they find it, without criticism. Thus while the defence of fair comment is treated (and, it is submitted, quite correctly treated) as outside the defence of privilege, yet there is no sign of dissatisfaction with the subjective test of fairness so unfortunately accepted in *Thomas v. Bradbury, Agnew & Co.* It is perhaps the fact that proof of malice has been allowed to destroy this defence that has led some writers to regard fair comment as a particular case of privilege. However, acquiescence in the existing state of law is not necessarily a defect in what is essentially a practitioners' handbook such as this, although even here criticism might sometimes suggest a useful line of argument to a member of the profession contemplating an appeal.

J. W. C. T.

The Lady Ivie's Trial. Edited by Sir JOHN C. FOX. Preface by the Provost of Eton. Oxford: Clarendon Press. 1929. c and 174 pp. (12s. 6d.)

Of all British judges George Jeffreys is the most famous. Without necessarily siding with his modern apologists who have held that his genius 'raised his transgressions out of the dull obscurity of ordinary misbehaviour' it is clear that it is not merely by his transgressions that his name has lived. His insobriety, his political bias, his intemperate tongue, his vindictive prejudgments of cases, are characteristics which, though fortunately rare, are such as it would not be impossible to parallel from the history of the Bench, especially when allowance is made for changes in the standards of different ages. But faults alone cannot give immortality; they must be combined with some finer qualities of mind to form a whole which can be summed up in the word personality. Personality Jeffreys certainly had. He holds the stage in any case in which he took part. This power of attraction is abundantly illustrated in the interesting case of the Lady Ivie. Sir John Fox has edited this trial with such care and scholarly skill that the result is a most admirable and entertaining book which can be cordially recommended to both lawyers and laymen. It not only makes excellent reading but it is enriched with references and comments which would well repay the attention of anyone engaged in research in the history of legal procedure or the rules of evidence.

J. W. C. T.

Goodeve's Personal Property. Seventh edition. By D. T. OLIVER, of the Middle Temple, Barrister-at-Law, Fellow and Lecturer in Law, Trinity Hall, Cambridge. London: Sweet & Maxwell, Ltd. 1930. lvii and 565 pp. (32s. 6d.)

'GOODEVE' has long been a favourite with students and teachers alike, and stands unrivalled as an introduction to the study of the law of personal property. This new edition has been rendered necessary by the changes recently introduced by the Companies Act, 1929, and issuing from the competent hands of Mr. D. T. Oliver it is, if anything, even better than before. The only suggestion—it is hardly a criticism—which occurs to the reviewer is that perhaps in future editions the question of documents of title to goods might be dealt with more fully owing to the growing importance of these documents in modern commerce. A special word of praise must be given to the extremely lucid and accurate summary by the learned editor of the law relating to companies, a branch of personal property which presents unusual difficulties when it becomes necessary to compress it into a form suitable for assimilation by beginners.

H. C. G.

Acta Academiae Universalis Iurisprudentiae Comparativae.
Vol. I. Edited by ELEMÉR BALOGH. 1928. Berlin: Hermann Sack. London: Sweet & Maxwell, Ltd. Paris: Marcel Rivière. xvi and 1190 pp.

THE International Academy of Comparative Law, which was founded at Geneva in 1924 and was transferred to The Hague in 1925, has furnished a visible sign of its activities in the volume under review. The first part of this book is largely formal, as it consists chiefly of the charter of the Academy, lists of members, and other documents of an official nature, but special attention may be directed to the obituary notices of Professor Vinogradoff by Sir Frederick Pollock and of Sir John Salmond by Dr. F. P. Walton. The second part contains a number of monographs on various topics of comparative law, the most interesting from the point of view of Anglo-American lawyers being Dean Pound's examination of the influence of comparative law on the formation of American common law, and Professor Vinogradoff's discussion of the problems of customary law. Professor Lambert formulates a theory of international common law which merits serious attention, and should be read in conjunction with the critical examination by M. André Weiss of the nature and characteristics of private international law in general. The third part is chiefly noteworthy for a discussion by Professor Lévy-Ullmann of the English law of agency viewed comparatively. This part also contains two valuable contributions, one by Professor Lee on the '*stipulatio alteri*' in Roman-Dutch law, and the other by Dr. F. P. Walton on responsibility for breaches of duty to neighbours in making use of immovables. The fourth part is biographical and possesses quite an interest of its own, inasmuch as it contains portraits of the various learned lawyers constituting the membership of the Academy. Professor

Balogh, the editor of this important work, is entitled to warm congratulations on the success which has attended his labours. The Acta of the Academy may truly be described as marking an epoch in the history of comparative law, the youngest but by no means the most insignificant of the various branches of juridical science.

H. C. G.

Maxwell on the Interpretation of Statutes. Seventh edition.

By G. F. L. BRIDGMAN. London: Sweet & Maxwell, Ltd. 1929. cxi and 372 pp. (£1 12s.)

ENGLISH lawyers are pretty well off with books on the interpretation of statute law. The treatises of Maxwell and Craies are standard works, and in some directions supplement one another. Mr. Bridgman tells us that in this new edition of Maxwell he has embodied recent examples of the principles stated in the text, and has deleted irrelevant and unnecessary matter. Otherwise he has left the structure of the book untouched. Two new features are decided improvements—the use of short titles of statutes wherever they exist, and the incorporation in an Appendix of the Interpretation Act, 1889. It would be a still further improvement if an Index of Statutes were added to the very full one of cases. Maxwell's book has always been a readable one, and the evil results of adhering too closely to literal interpretation are picturesquely illustrated by the promise of Mahomed II to spare the Venetian governor's head, which he strictly fulfilled by sawing his body in two; and by Tamerlane's burial alive of a garrison whose blood he had pledged himself not to shed. On a necessarily rough test, this edition seems to have been well done. With respect to recent cases, two suggestions may be made. *Harper v. Hedges* [1924] 1 K. B. 151 is not included (unless the Index of Cases is defective), and it raised an interesting query as to whether, for the purpose of giving legal validity to an act otherwise illegal, an Act of Parliament can in any circumstances be presumed to have been made and lost within the last 150 years. *Ormond Investment Co., Ltd. v. Betts* [1928] A. C. 143, to which bare reference is made on p. 31, might also have been noted more appropriately at pp. 107, 246—249, where the interpretation of statutes imposing taxes is treated.

P. H. W.

A Summary of the Law of Companies. By T. EUSTACE SMITH, of Lincoln's Inn, Barrister-at-Law. Fourteenth edition. By WILLIAM HIGGINS, of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Company, Ltd. Sydney, Melbourne, Brisbane: The Law Book Company of Australia, Ltd. 1929. xxii and 376 pp. (7s. 6d.)

THE first edition of Smith's Companies was published in 1878. It has now reached a fourteenth edition—a life of three years for each edition. No better evidence could be adduced of its merits and well-deserved

popularity. It is more than a mere summary, and is written from a practical standpoint. The task of bringing the book up to date has been well done, both with regard to case law and the Companies Act, 1929. A fuller discussion of some of the new sections would have been welcomed, but perhaps it would be out of place in a students' text-book. There is a good index, and a table of cases. In future editions it would be useful to insert a table of the sections of the Act of 1929.

T. E. L.

Les Year Books de Langue Française. Par JACQUES LAMBERT, Professeur Agrégé à la Faculté de Droit de l'Université de Lyon, Research Fellow of Harvard College. Paris: Recueil Sirey. 1928. 156 pp.

THIS accurate and lucid account of the Year Books, written by so eminent a French scholar, will help to dissipate any fears we might have entertained as to the future of these old treasures. It is gratifying that they are being studied by French jurists, who certainly will not find great difficulties with the quaint jargon of Norman-French. The author modestly states that his object is to present an account of the researches of the various editors of the Year Books. But he does more; he raises numerous points of considerable interest, and gives sound reasons for the views that appeal to him. He maintains that Turner's pamphlet theory of their origin has not yet received all the attention it deserves. The chapter dealing with case law in the Year Books is very instructive. Professor Lambert states that the Year Books were not compiled for the purpose of citation as authorities, but that they were the primary cause of our theory of judicial precedent. It would appear that on this matter he is not quite consistent (pp. 66—72). After examining the views held by Maitland, Turner, Bolland, Professor Winfield and Professor C. K. Allen, he observes that the Year Books have not yet been studied in sufficient detail to arrive at any definite conclusion as to the precise authority of decided cases. The weight of opinion, and from our own observation the whole evidence, seems decidedly against authoritative case law. On this matter, however, more will have to be said about the influence of written pleadings. Professor Lambert has done good service to Year Book studies, and we hope his valuable book will run to numerous editions.

T. E. L.

Annual Survey of English Law, 1928. London School of Economics and Political Science (University of London) Department of Law. 1929. xv and 301 pp. (10s. 6d.)

THIS survey is the joint work of the members of the Department of Law at the London School of Economics, and is designed primarily to provide the teacher, the student, and the foreign jurist with a general and critical view of the constant changes and developments in all the main branches of English law. The 'authors' have certainly achieved

their object. To teachers of law, whose task of keeping abreast of recent changes outside their particular subjects is daily becoming more arduous, this publication is a veritable boon. Eleven branches of law are dealt with, and every branch is treated under three headings, namely, (i) Legislation, a summary of the most important enactments; (ii) Case Law, a judicious selection of important decisions with useful comments; and (iii) Literature, a review of books and periodicals. The largest sections are devoted to Mercantile and Maritime Law, and Property and Conveyancing, both of which are dealt with in a practical manner. The analysis and the notes on case law in the latter should be of value to those who practise the law. The entire work is well done, and it undoubtedly fills up a gap which has long existed in the literature of English law. There is a table of cases (Krasler should read Kasler, p. xii) and a good index, and it would be well to add a table of statutes in the Survey for 1929.

T. E. L.

Snell's Principles of Equity. Intended for the Use of Students and Practitioners. Twentieth edition. By H. GIBSON RIVINGTON, M.A., Oxon., and A. CLIFFORD FOUNTAINE. London: Sweet & Maxwell, Ltd. 1929. clvi and 659 pp. (30s.)

An Analysis of Snell's Equity with Notes thereon. By E. E. BLYTH, LL.D. London: Sweet & Maxwell, Ltd. 1929. 257 pp. (10s. 6d.)

SINCE its first publication, in 1868, Snell's Equity has been the standard text-book for students of the subject. In the earlier years of this century it may be said to have suffered a partial eclipse for a time owing to the appearance of other excellent treatises on the subject, such as Professor Ashburner's Equity, and the posthumous publication of Professor Maitland's unrivalled lectures; but, following the great changes effected by the Property Acts, which have made it necessary to revise and restate large portions of the subject, the work has, in the competent hands of its present editors, displaced all competitors and regained its supremacy as the leading text-book on Equity. The work of editing, as in the case of the previous edition, has been carried through with great skill and judgment. The chapters dealing with Trustees (X), Administration of Assets (XVI), and Mortgages (XX), all of which involved complete re-writing by the editors either in this or the previous edition, appear to us models of clear exposition.

Dr. Blyth's Analysis of Snell is an attendant satellite of the larger work, most useful, if not necessary, to students for examinations, for whom it furnishes a ready-made note-book. In this respect it is also of great utility to many who are no longer troubled by law examinations but find it a handy guide to the latest developments of the doctrines of Equity and the legislation affecting them.

D. T. O.

English Constitutional History. By THOMAS PITT TASWELL-LANGMEAD, B.C.L., OXON. Ninth edition. By A. L. POOLE, M.A., F.S.A., Fellow and Tutor, St. John's College, Oxford. London: Sweet & Maxwell, Ltd. 1929. xxvi and 784 pp. (21s.)

An Analysis of the Ninth Edition of Taswell-Langmead's Constitutional History. By A. M. WILSHERE, M.A., LL.B. Fifth edition. London: Sweet & Maxwell, Ltd. 1929. 133 pp. (6s. 6d.)

THE new edition of Taswell-Langmead's Constitutional History will, we think, go far to restore the work to the position which it occupied as the ordinary text-book for students, other than specialists. It had been in some danger of losing this position in recent years owing to the appearance of formidable rivals, such as the work of Professor Adams, from the other side of the Atlantic. Mr. Poole, by modifying, and in some instances re-writing, the text in the earlier chapters, has been able very successfully to embody the results of recent research; and by re-arranging the last two chapters of the work and by adding a new section on Ireland and the Dominions has brought the work up to date so as to include an account of recent constitutional movements. In a work covering so great a field some omissions must naturally occur. Recent developments in that elusive body, the Cabinet, are perhaps not sufficiently discussed, no reference being made to the creation of a Cabinet Secretariat, a new feature of considerable constitutional significance; and the great change by which, since 1832, executive powers have been largely put on a statutory, as distinct from a prerogative, basis is not mentioned.

Mr. Wilshire's Analysis has proved itself very useful to students in the past, facilitating the reading of the principal work and furnishing a ready-made note-book. The present edition will no doubt be found of material assistance in mastering the larger work.

D. T. O.

Wright and Hobhouse's Outline of Local Government and Local Taxation in England and Wales (excluding London). Seventh edition. By CECIL OAKES, LL.M., Clerk to East Suffolk County Council. London: Sweet & Maxwell, Ltd. 1929. 254 pp. (12s. 6d.)

THE law of local government is a subject of great complexity. The gradual process of simplification which has been proceeding for the past five years should ultimately render the subject both more intelligible and more attractive to the non-expert. There are, besides lawyers, many to whom a knowledge of the outlines of local government is indispensable; there are still more whom it is desirable to interest in the subject. Wright and Hobhouse, now in its seventh edition under the editorship of a Clerk to a County Council, is a complete, but not an intricate, survey of the

various functions of local authorities, with three chapters on local government finance. It may be cordially recommended to the classes of readers mentioned above, as well as to the student of governmental institutions. It is not a popular outline, such as Jenks' *Local Government*, which should be read first, but a summary of the units of local government and their powers.

If we may suggest an improvement for future editions, it is that a chapter should be added dealing generally with the topics of (1) the relations between Whitehall and the local authority, and (2) judicial control of public authorities. The first of these topics is apparent on all sides and, to a lesser degree, the second. But a chapter devoted exclusively to them would serve to emphasize the constitutional aspects of local government.

On p. 142 it has escaped attention that the policing of royal dockyards is now mainly performed, not by the Metropolitan Police, but by the Royal Marine Police. The record of debates in Parliament (p. 257) should be brought down to a later date than 1914. There have been many important debates of late, especially the speech of Mr. Neville Chamberlain, as Minister of Health, on the Second Reading of the Local Government Bill, 1929.

E. C. S. W.

Parliament and the British Empire. By R. L. SCHUYLER, Professor of History in Columbia University. New York: Columbia University Press. 1929. vi and 279 pp. (English price, 18s. 6d.)

THIS collection of essays, of which the first appeared in this Journal in 1928, deals with the legislative competence of Parliament outside Great Britain. It serves as a useful reminder that Dicey's Parliamentary Sovereignty has not always been an axiom of the Constitution. We are reminded in the first essay that early Parliaments cannot properly be entitled Parliaments of England, but Councils of the King; a survey of early statutes emphasizes that their jurisdiction never was confined to England in early times. Ireland, the position under the Commonwealth, the protests of the West Indies at the Registry Bill, and the subsequent emancipation of slaves, form the themes of the other three historical essays, while a brief account of the present position concludes the volume. The chief value of the book to students of constitutional law is that it contains a good deal which will make intelligible to them the provisions of the Colonial Laws Validity Act, 1865, a measure which is open to misconstruction if divorced from the colonial policy of the preceding hundred years.

E. C. S. W.

A Treatise on Wills. By THOMAS JARMAN. Seventh edition. By CHARLES PERCY SANGER, of Lincoln's Inn, Barrister-at-Law, assisted by IRENE COOPER WILLIS, of the Inner Temple, Barrister-at-Law. In three vols. London: Sweet & Maxwell, Ltd. 1930. Vol. I, cccxxx and 595 pp. Vol. II, pp. 597—1524. Vol. III, pp. 1525—2266. (£5 10s.)

THE seventh edition of Jarman was not published in time to enable justice to be done to it by a review in our issue this year. But we wish to take the opportunity, which its appearance offers, to record our profound sense of the loss which law, letters, and science have sustained by the death of its brilliant editor, Charles Percy Sanger. In the judgment of competent persons Sanger had few peers, and no superiors, among the intellectuals of the last thirty years. Having been third wrangler in 1893 and elected to a Fellowship at Trinity in 1895, he was called to the Bar and practised on the Chancery side until his death in February this year. Extreme quietness, amounting almost to inaudibility, in Court prevented him from attaining forensic success. That he was content to spend his superb intellect in editorial work, however important, was, in the opinion of some of us, a national tragedy, the more poignant in that his last effort probably killed him. His versatility is illustrated by the fact that he was equally at home in the advanced literature of modern physics and in the intricacies of the Russian and Hungarian tongues. Of this and of his character, no less fine than his intellect, Mr. Lowes Dickinson tells, in moving words, in *The Nation* of February 22. We shall earn the gratitude of our readers more by giving a reference to his tribute than by enlarging ours.

H. A. H.

The Development of Extraterritoriality in China. By G. W. KEETON, M.A., LL.M. London: Longmans, Green & Co. 2 vols. 1928. xvi and 405 pp. viii and 422 pp. (42s.)

MR. KEETON'S book has appeared at a particularly opportune moment. It is an account of the development of foreign juridical relations with China from the beginnings of European intercourse down to the recent Report of the Extraterritoriality Commission. It is a thorough and a scholarly work. The sociological and international bearings of Extraterritoriality, and its mutual relations with the internal development of China, the revision of her legal code, and her acquisition of an international sense, are clearly indicated. The second volume is mainly composed of original documents arranged in a series of numbered appendices. We welcome a book which will be invaluable to the student, and of great interest, especially in the historical and sociological sections, to the general reader.

H. O.

The Dominions and Diplomacy: The Canadian Contribution.

By A. GORDON DEWEY, M.A. (McGill), Ph. D. (Columbia),
Department of Public Law, Columbia University. London:
Longmans, Green & Co., Ltd. 1929. 2 vols. xv and
375 pp; vi and 397 pp. (45s.)

IN view of the increasing significance since the war of world politics and Dominion representation on International Councils, it has become a matter of vital importance whether citizens of the Empire 'develop a spirit of Imperial consciousness . . . as the readiest guide from the caves of provincialism into the brighter sunshine of international goodwill,' or, assuming complete equality and autonomy in respect of their foreign relations, cease to deceive themselves with what is called 'foolish flag-flappery.' The justification of these two volumes should be found in their attempt to elucidate some of the confusions of thought which have arisen, the writer holds, from the failure to distinguish the 'internal' aspect of the Britannic question—i.e., the Constitutional relations among the members of the Commonwealth—and 'external' estimation of 'forces operating in and upon the several British nations, and of their general situation in relation to world affairs.'

In virtue of this distinction the author criticizes the Imperialist and the Nationalist points of view from a political standpoint. The conduct of imperial foreign relations is traced from the roots of the controversy—the Russell-Grey Enabling Act of 1846—through the effects of the Great War with its resulting misapprehensions of dominion motives and attitudes—the implications of the Versailles Settlement and League Membership—to the latest phase, involving international movements for mutual guarantee, and the last Imperial Conference, concluding with due emphasis on the *modus vivendi* reached at Locarno in 1926. Suggestions for the future bring the work to a close.

H. O.

Source Book of Constitutional History from 1660. By D.

OSWALD DYKES, K.C., M.A., LL.B. London: Longmans,
Green & Co., Ltd. 1930. xi and 505 pp. (21s.)

THIS book has in mind the needs of the student preparing for an Honours degree in History. It comprises the texts of statutes and the more important legal cases relevant to Constitutional History subsequent to the Revolution Settlement of 1660. A few other documents are included which have not hitherto been easily accessible, and which have consequently, the author thinks, been somewhat neglected by teachers as well as students. The chapter on the Revolution Settlement includes the Declaration for Liberty of Conscience in 1687, the Order in Council relating to the foregoing, William's Proclamation to the English people before and after landing, his Scottish Proclamation, his speech to the Scottish Lords with their reply, and his letter to the Estates and their reply. The chapter on the United Kingdom deals more fully with the Scottish situation prior to the Union of 1707 than any source book hitherto published.

In spite of its extended scope the newer book adds relatively little important material to Grant Robertson's collection, with the appendix on the extension of the franchise, alterations in the poor law, local government, and the reorganization of central and county courts of justice. The nineteenth century legislation on these subjects is not included by Mr. Dykes, but he supplements Grant Robertson by the inclusion of Acts illustrating Colonial constitutional development, and the Irish Free State Constitution Act of 1922.

Instead of interpolating explanatory notes before statutes and cases, the author has given a brief synopsis of the salient features of Constitutional History to be illustrated. The material is not arranged strictly in chronological order, but is conveniently grouped in chapters according to the subject under consideration.

H. O.

Jurisdiction in Marginal Seas. By W. E. MASTERSON, M.A., LL.B., S.J.D., LL.D. London: Macmillan & Co., Ltd. 1929. xxvi and 423 pp. (21s.)

IN view of the proposed codification of International Law this book is a welcome contribution to a particularly controversial branch of this subject. And it has a special interest since certain States have recently excluded some articles of commerce and imposed heavy duties on others. The title, however, would suggest a wider subject than that actually dealt with. The actual subject is the 'jurisdiction over foreign smuggling craft to prevent the clandestine introduction of prohibited or dutiable goods into a nation's commerce.' Other categories of law, such as those relating to fisheries, neutrality, quarantine, salvage, etc., are discussed only in so far as they are likely to throw light upon the main issue.

The author has not approached his subject in order to substantiate a preconceived theory, but has attempted to explain the present laws by an analysis of 250 years of historical background. This has involved diligent research into statistics, diplomatic correspondence, Parliamentary debates, official reports of legislative committees, Rolls, and Custom-House records, etc. etc. And much of his material has not hitherto been published. The author bases his conclusions entirely upon these original sources, and concludes with some interesting suggestions on the possibility of international legislation providing for the fiscal interests of States beyond the zone of so-called territorial waters.

H. O.

Current Research in Law. M. J. HARRON and H. OLIPHANT. Published in U.S.A. by the Johns Hopkins Press, and in London by Humphrey Milford. 1929. 218 pp. (9s.)

SCHOLARS cannot be too grateful for the fact that there exist intelligent people willing to face the indescribable tedium involved in the preparation of a work of this kind. The authors wrote to the faculties of the numerous law schools in the United States, and to many other associations and

bureaus, asking what books on legal subjects they knew to be in process of being written. Replies were evidently full and helpful. The results are tabulated under subject headings. One looks up, for instance, Conflict of Laws, and finds that there are twenty-two entries, among which one may single out for mention the names of the two distinguished legal scholars, J. H. Beale, of the Harvard Law School, and W. W. Cook, of Johns Hopkins University, both of whom have treatises in preparation. And so on.

It is hinted that there may be further editions of this valuable publication. It is to be hoped that all libraries and many scholars will forward the project by buying this issue.

H. A. H.

Dart's Treatise on the Law and Practice relating to Vendors and Purchasers of Real Estate. Eighth edition by the late E. P. HEWITT, K.C., assisted by D. HUGHES PARRY, and by M. R. C. OVERTON. London: Stevens & Sons, Ltd. 1929. Two volumes. cclxxvi and 1368 pp. (£5.)

It is nearly twenty-five years since the last edition of Dart; consequently the editors have had a formidable task to perform. There has indeed been so much new case law and statute law in that period that we are surprised that anyone was willing to give so much work to a production which would not bear his name as author. The publishers are certainly to be congratulated on their fortune in getting the work so well done. Unluckily, Mr. Hughes Parry was unable to continue his assistance after the completion of the first volume, and Mr. Hewitt died before the completion of the second, so Mr. Overton had to shoulder sole responsibility for half of the latter. Whatever may have been his sufferings, they have not reacted upon the profession, for the whole work seems, so far as can be judged in the first few months after its appearance, to have been competently performed. It is inevitable that there should be some inaccuracies. One, which is of no practical consequence, should be corrected, on page 618, as the case concerned (*Craddock v. Hunt*) is an important one. The proceedings were not an action by the vendor, as is there stated.

The appearance of the volumes, within and without, is most creditable to the publishers. It is a pity that they do not tell us who Mr. Dart was, or give us his original preface, for to our generation he is but a name.

H. A. H.

Kerr on Fraud and Mistake. Sixth edition by S. E. WILLIAMS. London: Sweet & Maxwell, Ltd. 1929. 717 pp. (£2 2s.)

W. W. KERR published his well-known book in 1868, and brought out a second edition in 1883. The third edition, in 1902, and subsequent editions, have been produced under the care of Mr. S. E. Williams. The learned editor has placed lawyers under so many obligations by his scholarly work that they will regard his name on the title page as

a guarantee. In this particular instance he has had the happy idea of incorporating H. W. May's treatise on Fraudulent Dispositions, and thereby added to our debt. Messrs. Sweet & Maxwell evidently realize the value of the appeal to the eye, for their books generally wear a distinguished appearance. This one is no exception, and its price compares favourably with that of volumes of similar size.

H. A. H.

Everyday Statutes Annotated. An abridgment containing statutes of practical utility in force on January 1, 1929, with notes of cases bearing on their interpretation. Edited by S. E. WILLIAMS, of Lincoln's Inn. Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1929. Vol. II, Death Duties to Landlord and Tenant, 891—1866 pp. Vol. III, Lands Clauses to Settled Land, 1867—2736 pp. Vol. IV, Shipping to Wills, Companies, and Indexes, 2737—3588 pp. (£8 8s. per set of 4 vols.)

VOL. I of this very useful work, containing the titles 'Act of Parliament' to 'Criminal Law,' was received in time for notice in our last year's issue. It has been very promptly followed by the remaining three volumes, and the complete work now forms a handy work of reference in which are collected all or most of the statutes that the average practitioner is likely to need in the ordinary course of his business. A valuable feature of the work is the commentary in the form of annotations indicating the way in which the provisions of the statutes have been interpreted and applied in practice. A subject index and alphabetical and chronological indexes in the fourth volume make the work of reference easy.

A Selection of Leading Cases on Various Branches of the Law. With Notes. By JOHN WILLIAM SMITH. Thirteenth edition. By Sir THOMAS WILLES CHITTY, Bart., K.C., Benchet of the Inner Temple; ALFRED THOMPSON DENNING, of Lincoln's Inn and the Western Circuit, Barrister-at-Law, and CYRIL PEARCE HARVEY, of the Inner Temple and the Western Circuit, Barrister-at-Law. Two vols. London: Sweet & Maxwell, Ltd. ccxlvii and 916 pp., and vi and 937 pp. (£4 10s.)

A STUDY of the successive editions of Smith's Leading Cases affords an interesting exercise in tracing the development of the law during the last century. New layers of notes appear in each successive edition like the periodical addition to the circumference of trees, plainly traceable in section. In the present edition this feature is not so distinct as in the earlier editions, as the notes have been carefully revised and re-arranged. Since the tenth edition, the first undertaken by the learned and gifted editor-in-chief, whose death since the issue of these volumes we all deplore,

the irritating practice of enclosing the notes of previous editors in brackets has been very wisely abandoned.

In the present edition the old leading cases *Rose v. Hart*, *Nepean v. Doe*, and *Taylor v. Horde* follow *Bickerdike v. Bollman* and *Horn v. Baker* into retirement, their vacant places being filled by the introduction of *Davies v. Mann* and *Taylor v. Caldwell*. In both cases the selection is amply justified. It was desirable to bring together the notes on liability for negligence, which were previously to be found included in the commentary on *Ashby v. White* and other cases, in view of the great and increasing importance of the topic at the present day; and the difficult subject of supervening impossibility as an excuse for non-performance of a contract has of late led to so much discussion that the inclusion of the leading case of *Taylor v. Caldwell*, with a review of all the recent cases on the topic, is a most welcome addition to the work.

D. T. O.

The Law of Bills of Exchange, Cheques, Promissory Notes and Negotiable Instruments Generally. By BERTRAM JACOBS, LL.B., London. Third edition. London: Sweet & Maxwell, Ltd. 1930. 278 pp. (10s. 6d.)

THIS book has been little altered since the second edition, which appeared six years ago. The author has resisted the temptation to allow the matter to expand, but he has brought the case law up to date, and has re-arranged and enlarged the part devoted to cheques. He has also introduced an improvement in displaying more distinctly the text of the Bills of Exchange Acts.

Little need be said by way of commendation of the work. Its merits are already well known to students. If we may make a suggestion, it would be that the author should in the next edition reconsider his discussion of negotiability in Chapters I and II. It seems as if the expression is used in two rather different senses. Does negotiable instrument mean an instrument transferable with all the consequences of negotiability *in its present state*, or does it include an instrument which is capable of being made negotiable by indorsement? It is probably necessary to be somewhat inconsistent and to call certain documents negotiable instruments even though not in a negotiable state, but we think that the attention of the student should be called to the fact that a negotiable instrument within the definition in Chapter II does not necessarily possess the characteristics of negotiability within the definition in Chapter I.

H. A. H.

Pseudo-Security. By J. M. SPAIGHT. 1928. London: Longmans, Green & Co. 177 pp. (12s. 6d.)

IN this small and interestingly written book, Dr. Spaight examines critically the effects of the guarantees and sanctions of the Covenant of the League of Nations which contemplate the use of corporate force against

a State resorting to war. He indicates the cases where war is possible and lawful under the Covenant, and argues that the provisions of the Covenant which purport to protect the innocent victim of aggression are valueless; that armies and navies are lightning conductors to draw away the menace of air attack from the civil population, and that while civil aviation remains the dangers of sudden attack remain; disarmament may, therefore, increase insecurity. His indictment of the League of Nations is only so far as it is an organization for *imposing* peace. The constructive suggestion of the author is that the League should confine its work to *organizing* peace; security, which can never be absolute, is best brought about by 'regional pacts,' such as that of Locarno. It is unfortunate that this book was published just before the signature of the Kellogg-Briand Pact; the reader would have been interested in Dr. Spaight's views on that document.

This is a book worth the attention of students of International Law, and of the general public. Most readers will feel that there is a good deal to be said on the other side, but a perusal of the book may make them endeavour to formulate their arguments against Dr. Spaight's thesis, and that effort will probably have the result of stopping a good deal of loose thinking and shallow idealism.

A. P. H.

Clerk and Lindsell on Torts. Eighth edition. By W. A. MACFARLANE and G. W. WRANGHAM, of the Inner Temple and North East Circuit, Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1929. cxxx and 827 pp. (45s. net.)

WE regret that owing to an oversight, this work did not come into the hands of the reviewer until it was too late to deal with it as fully as it deserves. The first edition appeared in 1889, and quickly established itself in the favour of practitioners so as to become the text-book on the subject most frequently resorted to in chambers. In the course of forty years it has run through seven editions, and the present, the eighth edition, will, we think, maintain its established reputation.

The editors have very wisely omitted the part of the work relating to Workmen's Compensation as not strictly within the scope of the subject. This has enabled them to reduce the length of the book by some eighty pages. Chapter XXI, dealing with wrongs affecting incorporeal personal property, has of necessity been almost entirely re-written; but the subject-matter is of so specialized a description and so largely covered by statute law that it would have been better to have excised this also.

The difficult questions arising on the subject of damages following on the *Polemis* decision are very fully treated (pp. 126—137), and the topic of the duty of the occupiers of premises to licensees and others has received full attention in view of *Fairman's Case* [1923] A. C. 74.

We doubt whether *Hurst v. Picture Theatres, Ltd.*, is yet settled law, as the editors appear to think.

D. T. O.

'*Law Notes*' Year Book, 1930. An Alphabetical Digest of the Chief Statutes, Rules, Orders, and Cases of the Year 1929. By the EDITORS of 'Law Notes.' 'Law Notes' Publishing Offices. (7s. 6d.)

The Property Statutes Up-to-Date. Being a supplement to the second edition of the 'Law Notes' Guide to the New Property Statutes. Third edition. By H. GIBSON RIVINGTON, M.A., OXON, and A. CLIFFORD FOUNTAINE. (5s. net.) 'Law Notes' Publishing Offices. 1930.

THESE two most useful publications will, we hope, develop into hardy annuals, and should be in the hands of every student of English law. Practitioners will also find them very helpful.

The Divorce and Separation of Aliens in France. By LINDELL THEODORE BATES, LL.D. Columbia University Press. Humphrey Milford. 334 pp. (35s.)

THE subject-matter of this book is one of considerable importance, having regard to the large foreign population resident in France and particularly its British and American elements. Dr. Bates's work is of value both to aliens resident in France who wish to be divorced or separated and also to those aliens, of whom there appear to be not a few, who visit France for these purposes. It not only explains the French law and practice, but examines the matter from the point of view of conflict of laws, and includes two useful chapters entitled 'Recognition in England' and 'Recognition in the United States.'

The Contract of Sale of Goods. R. A. EASTWOOD, LL.D., of Gray's Inn and the Northern Circuit, Barrister-at-Law, Professor of Law and Dean of the Faculty of Law in the Victoria University of Manchester. London: Longmans, Green & Co., Ltd. (3s. 6d.)

THIS book is the first of a series on Commercial Law for the more advanced, but non-professional, student of the subject. It does not presuppose the knowledge of the lawyer, but presents clearly and concisely the law of the sale of goods in a most readable manner. Mr. Eastwood is to be congratulated on putting the law in so interesting a way in this admirable little book.

J. R. R.

A Digest of the Law of Partnership. With Forms and an Appendix on the Limited Partnerships Act, 1907, etc. By the Right Hon. Sir FREDERICK POLLOCK, Bart., K.C., D.C.L. Twelfth edition. London: Stevens & Sons, Ltd. 1930. xxiv and 270 pp. (15s.)

THE eleventh edition appeared in 1920. Sir Frederick Pollock's work is so far established as the text-book on the subject as to have passed beyond the realm of criticism. All we need say with reference to the new edition is that the few cases, about a dozen in number, raising any new questions of importance are indicated in the notes, and changes in reference, arising from new legislation, have been duly made.

Principles of Mercantile Law. By J. CHARLESWORTH, LL.D. (Lond.), of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1929. xxxvi and 360 pp. (8s. net.)

AN excellent text-book on the subject, clear and concise. It should have a large circulation.

Englisch-Deutsches und Deutsch-Englisches Wörterbuch der Rechts- und Geschäftssprache. Von DORA v. BESELER. Berlin und Leipzig: Walter de Gruyter & Co. 1929. 223 pp. (RM. 10.)

THIS is a small but very useful dictionary of most of the words and phrases employed in ordinary legal practice. It should prove most helpful to both English and German students and is also a book which will be found of great use in business offices.

The Principles of Equity. By A. M. WILSHERE, M.A., LL.B., of Gray's Inn and the Western Circuit, Barrister-at-Law. Second edition by L. B. TILLARD, of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1929. 8vo. xxvi and 600 pp. (£1 2s. 6d.)

WE are glad to see a new edition of this useful work embodying the legislation of 1925. Mr. Tillard, who is responsible for this edition, has evidently revised the text with great care, re-written considerable parts of the work where necessary, as in the chapters on Trusts and Trustees and Administration of Assets, and extended a very welcome feature of the work in illustrating the principles discussed by short summaries of selected cases. Many students who find Snell difficult will find this work a good alternative.

J. W. C. T.

Other books and publications received (some will be reviewed in next issue):—

An Introduction to the Science of Law. By ALBERT KOCOUREK, Professor of Law at Northwestern University. 1930. Boston: Little, Brown & Co. xii and 343 pp.

The Elementary Principles of Jurisprudence. By G. W. KEETON, M.A., LL.M. 1930. London: A. and C. Black, Ltd. xii and 324 pp. (12s. 6d.)

The International Protection of Trade Marks by the American Republics. By STEPHEN P. LADAS, D.N., A.M., LL.B., S.J.D. 1929. (Harvard Studies in International Law I) Harvard University Press.

The International Protection of Industrial Property. By STEPHEN P. LADAS, D.N., A.M., LL.B., S.J.D. 1930. (Harvard Studies in International Law II) Harvard University Press.

Theorie der Rechtsquellen. Von ALF. ROSS. (Wiener Staats-u. Rechtswissenschaftliche Studien.) 1929. Leipzig und Wien: Franz Deuticke, (M. 30.)

Powers of Attorney. Manual on the Law and Practice. Issued by the Chartered Institute of Secretaries. Second edition. 1930. Cambridge: W. Heffer & Sons, Ltd. (5s. net.)

Streik Aussperrung und Berufsverbände im neuen englischen Arbeitsrecht. Von DR. LUDWIG HAMBURGER. 1929. Mannheim: Bensheimer. 80 pp. This is a laudable attempt to explain the English law on the subject of strikes, lock-outs and industrial disputes for the benefit of German students.

Australia and the British Commonwealth. By the HON. J. G. LATHAM, K.C., M.A., LL.B., Attorney-General of the Commonwealth of Australia. With a Foreword by the RIGHT HON. S. M. BRUCE, C.H., P.C., Prime Minister of the Commonwealth of Australia. Being the John Murtagh Macrossan Lectures, 1928. 1929. London: Macmillan & Co., Ltd. ix and 149 pp. (7s. 6d. net.)

Outlines of Jurisprudence. By B. R. WISE, B.A. Revised by P. H. WINFIELD, LL.D. Fifth edition by D. T. OLIVER, LL.M. Oxford: J. Thornton & Son. 157 pp. (3s. 6d.)

United States Supreme Court, 1928—1929. A Review of the Work of the Supreme Court of the United States for October Term, 1928. By GREGORY HANKIN, A.M., LL.M., and CHARLOTTE A. HANKIN, A.B., LL.B. 1929. Legal Research Service, Washington, D. C.

Codigo Civil Pan Americano. Titulo Preliminar: Derechos Personales—Derecho de Familia. By DR. PROF. FRANCESCO CONSENTINI. 1929. Habana: Vox Populorum, Prado 64.

Rassegna Bibliografica delle Scienze Giuridiche Sociali e Politiche. Anno V, Fasc. 1. Gennaio-Marzo, 1930. Nicola Jovene & Co. Via Mezzocannone 109, Napoli.

Handbook of Cambridge Law School, 1929—1930. Cambridge University Press. (2s. 6d.)

The Law Student. A magazine for students and lawyers. Vol. VI, No. 5, May, 1929; Vol. VII, No. 1, October, 1929. The American Law Book Co., Brooklyn, New York.

National University Law Review. Vol. X, No. 1, January, 1930. Subscription Price, \$1.50 per annum, 75c. per number.

Annals of the American Academy of Political and Social Science: The Anti-Trust Laws of the United States. Vol. 147, No. 236, January, 1930.

A Defence of Jurisprudence. By K. H. BAILEY, M.A., B.C.L. Being the inaugural lecture from the Chair of Jurisprudence in the University of Melbourne, delivered on May 17, 1929. University of Melbourne Publications, No. 13. Macmillan & Co., Ltd. (1s. 6d.)

Theories of Law and the Constitutional Law of the British Empire. An address read before the Canadian Bar Association, Quebec, September 6, 1929. By W. P. M. KENNEDY, M.A., LL.B., Litt.D., Professor of Law in the University of Toronto.

The Law of the Lord or the Common Law. By the REV. W. PASCOE GOARD. 1929. The Covenant Publishing Co., Ltd. (3s. 6d.)

Die 'feindliche Eigenschaft' von Schiff und Ladung in der englischen Prisenrechtsprechung des Weltkriegs. Von HEINZ PFLÜGER. (Hamburgische Universität: Abhandlungen und Mitteilungen aus dem Seminar für Öffentliches Recht. Heft 21.) 1929. Hamburg: Kommissionsverlag von Lütcke & Wulff.

Lavori Preparatori del Codice Penale e del Codice di Procedura Penale. Vol. VIII. *Progetto Preliminare di un nuovo codice di Procedura Penale con la Relazione del Guardasigilli on.* ALFREDO ROCCO. 1929. Roma: Tipografia Delle Mantellate.

League of Nations. Conference for the Codification of International Law. Vol. I: Nationality. Vol. II: Territorial Waters. Vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners. Bases of discussion drawn up for the Conference by the Preparatory Committee, Geneva, 1929.

Carnegie Endowment for International Peace. Division of International Law. Annual Report of the Director for the Year, 1928. James Brown Scott.

The Milligan Case. Edited by SAMUEL KLAUS, of the New York Bar. London: George Routledge. 476 pp. (15s.)

Law of Property in Land. By H. GIBSON RIVINGTON, M.A. (Oxon.). London: 'Law Notes' Publishing Offices. 1930. xx and 522 pp. (21s.)

The Morality of Punishment. By A. C. EWING, M.A., D.Phil. (Oxon.). London: Kegan Paul, Trench, Trubner & Co., Ltd. 1929. xiv and 233 pp. (10s. 6d.)

The Trial of Socrates. By COLEMAN PHILLIPSON. London: Stevens & Sons, Ltd. 1928. 430 pp. (21s.)

Forms of Individuality. By E. JORDAN. Progress Publishing Co. 1927.
